United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

299

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,515

FRANCIS G. COVIELLO
and
WILLIAM ALFRED GADDY

Appellants

v.

LEONA RUTH TERHUNE

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS

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STATEMENT OF ISSUES PRESENTED*

I. Did the court below err in refusing to give an instruction on assumption of risk and on contributory negligence where there was sufficient evidence produced by the witnesses in testimony to rule as a matter of law on either point or at the very least questionable facts for determination by the jury?

*This case has not previously been before this Court.

II. Did the court below err in refusing to give instructions on common and joint venture, principal and agent, and on imputation of the driver's negligence where there was sufficient evidence produced by the witnesses in testimony to rule as a matter of law on these points or at the very least questionable facts for the determination of the jury?

III. Did the court err in failing to grant judgment notwithstanding the verdict and/or to grant a new trial on the grounds that the verdict against the appellants was contrary to the overwhelming weight of the evidence and the law?

JURISDICTIONAL STATEMENT

This action for personal injury damage was instituted in the United States District Court for the District of Columbia by the plaintiff (appellee) Leona Ruth Terhune against defendant Francis G. Coviello (appellant) and defendant William Alfred Gaddy (appellant). Defendant Coviello cross-claimed against defendant Gaddy. As the amount in controversy exceeds $10,000 exclusive of interest and costs, the District Court had jurisdiction under Title 11, Section 306, District of Columbia Code.

Final judgment for the appellee Terhune was entered on September 13, 1968 against both appellants. Final judgment was entered for the appellant Coviello versus the appellant Gaddy on the cross-claim for contribution on September 16, 1968. A timely filed motion for judgment notwithstanding the verdict, remittitur or new trial was denied on September 24, 1968. Notices of appeal by the appellants Coviello and Gaddy were filed on October 16, 1968. This Court has jurisdiction under 28 U.S.C. 1291.

STATEMENT OF THE CASE

This action arose out of an intersectional collision that occurred at the intersection of 15th and R Streets, N.W., Washington, D.C. at approximately 1:40 a.m. on the morning of May 30, 1963. The plaintiff (appellee) Mrs. Leona Ruth Terhune was a passenger in an automobile driven by defendant (appellant) William Alfred Gaddy. Defendant (appellant) Francis G. Coviello was driving north on 15th Street when his car was struck in the right rear by an automobile driven by defendant William Alfred Gaddy. Defendant Gaddy was then driving west on R Street. The collision occurred in the intersection in the northwest quadrant of the intersection.

On the morning of May 29, 1963 Alice Terhune and Leona Ruth Terhune made arrangements to drive to Washington to pick up an uncle named William Maylard. They left Salamanca, New York, at approximately 10:00 a.m. Prior to leaving they had agreed that they would share the driving to the D.C. General Hospital in Washington, D.C. and pick up Mr. Maylard and then would return to Salamanca without any plans to spend the night in Washington, D.C. or elsewhere. Travelling with them were a Mrs. Wells, 70-year-old mother of Alice Terhune, and Allen Terhune, the minor son of Alice Terhune.

Leona Ruth Terhune, appellee, was operating the car when they arrived in Washington, D.C. After being unable to find their destination, she pulled into a parking lot in the 1300 block of Connecticut Avenue to request instructions and ultimately to have appellant Gaddy assist them to the hospital and return. On the return trip at which time Gaddy was operating the vehicle the collision occurred and appellee received injuries.

Appellee, Leona Ruth Terhune, brought action against both Francis G. Coviello and William Alfred Gaddy for personal injuries.

Appellants requested a motion for a directed verdict at the close of the plaintiff's case and renewed said motion at the close of all the evidence. Following the verdict returned against them, both appellants filed joint motions for judgment notwithstanding the verdict and/or for new trial.

Appellants filed the aforesaid motions due to the failure of the trial court to give requested instructions on issues relating to the contributory negligence of the appellee; the imputation of negligence to the plaintiff through the agency arising out of employment, control, or a common or joint venture; and, the assumption of the risk.

1. Principal and Agent, Joint and Common Venture and Imputation of Negligence.

A central issue in the trial below was the question of agency. Appellee Terhune made arrangements with her sister-in-law, Alice Terhune, to drive to Washington, D.C. to pick up an uncle (App. 31, 32) in order to share the driving right down and right back (App. 32). When they arrived in Washington, D.C., appellee Terhune was driving the car and drove into the parking lot to find out where the D.C. General Hospital was located. At this time, she testified arrangements were made for appellant Gaddy to take over the wheel (App. 33, 34). Appellee Terhune had gotten behind the wheel intending to drive but they decided appellant Gaddy would drive because he knew the city better. Appellee Terhune sat next to the driver and the 70-year-old Mrs. Wells sat on the right side next to the door (App. 34).

Alice Terhune testified that she requested appellee Terhune to come with her because she wanted help with the driving. She wanted to come to pick up her Uncle Maylard at the hospital (App. 15). They drove straight through to Washington with appellee Terhune alternating with her in the driving, arriving here after dark (App.

15). Appellee Terhune was driving when they stopped at the parking lot.

The appellant Gaddy testified that he had stopped by the parking lot to visit his brother. He saw the car operated by appellee Terhune and he identified her at the trial as the person who drove into the lot. His brother asked him to guide them over to the D.C. General Hospital. He testified that he got into the right side of the car and appellee Terhune drove the car out of the parking lot towards the hospital (App. 17). During the trip to the hospital appellee Terhune asked him if he would take over because she was tired and he did (App. 21, 22). At a point in the area of Constitution Avenue, Washington, D.C. he got out of the right side of the vehicle and entered the left side. At that time appellee Terhune shoved over and sat next to him during the operation of the car and assured him that he would be paid for his time. (App. 21, 22).

Appellant Gaddy testified that he was paid by the parties for this trip (App. 24). During the time they were at the hospital appellee Terhune stayed with him at all times in the car; all the other people went inside the hospital (App. 22).

2. Assumption of Risk and Contributory Negligence.

Appellee Terhune testified that, when she met Mr. Gaddy, they did not ask him whether he was properly licensed to drive a vehicle, had never seen him before, had never seen him drive before and that she was present during all conversations with Mr. Gaddy (App. 42); that no one asked Mr. Gaddy whether he had worked that particular day; that no one asked him whether he was exhausted or tired (App. 44) and that she had the car under control and slid over to let Mr. Gaddy operate the car (App. 43, 44); that during the operation of the vehicle by Mr. Gaddy while driving from the hospital to where the accident occurred she did not observe Mr. Gaddy, was not watching him and did not look at him (App. 43, 45).

On cross-examination by Mr. Smith, appellee Terhune testified that she had met Mr. Gaddy around 11:00 o'clock p.m. that night and that she had been operating her car since 10:00 o'clock a.m. that day and had spent about half that time driving. First Alice Terhune would drive and then appellee would drive; that they went back and forth (App. 45); that at the hospital while waiting for the others to come back to the car both appellee and Gaddy sat in the car for 1½ to 2 hours during which time they conversed back and forth (App. 45).

Mr. Gaddy testified that he went to work from 8:00 a.m. to 5:00 p.m. that evening. When he finished his work he visited his brother in the 1300 block of Connecticut Avenue; that he does not remember anyone in appellee's car asking anything about himself, how long he had lived in this area, where he worked, whether he had a driver's license or anything of that nature (App. 22); that he was at the hospital for an hour or two; that he was tired, fatigued and sleepy; that he thought he took a nap while he was waiting with the appellee Terhune and while he was in the same car with her; that prior to the accident he heard someone shouting in the car; that he had possibly dozed off and that he came out of it when he heard the shout, "Watch it, you're going to hit." (App. 23, 24) He testified that he was tired and sleepy all the way from the hospital to where the accident occurred and when he heard the shouting he woke up and that he actually closed his eyes and yawned and that is what he called dozing (App. 25).

3. Charge to the Jury.

Prior to charging the jury, certain instructions were in the process of being prepared. When the court was notified, it was agreed by all parties that the Standardized Jury Instructions would be used. Written Instruction No. 4 on contributory negligence on the part of

appellee Ruth Terhune was offered and objected to on the basis of the foregoing evidence set forth in paragraph 2 herein and that same was insufficient. The same was denied by the court (App. 26-27), on the grounds of insufficient evidence. Following this, appellant Coviello requested instructions on imputation of negligence as an agent of the principal (App. 27). The court stated that she planned on giving that one. Such instruction was objected to by attorney for the appellee and the court replied that she just thought it was a jury question with the proper instructions on what to look for and that she had planned on instructing as to passenger imputation of driver's negligence, together with an explanation of joint venture. (App. 28). The court further went on to indicate that she planned on giving jury instruction No. 91 of the Standardized Jury Instructions, "Passenger–Imputation of Driver's Negligence" together with Instruction No. 74 (App. 46). It was at this point that attorney for the appellant Coviello advised the court that his secretary was in the process of typing instructions but because of the court's inclination towards the Standardized Jury Instructions, counsel for Coviello called his office and told his secretary to stop typing same. (App. 46).

The court reiterated herself upon request of Standardized Jury Instruction No. 91 and 92. The court replied that she planned to give those instructions together with additional explanations not requested.

At this point the Court read into the record her planned instruction on combining of driver's negligence with joint venture (App. 47, 48). Then the court, after discussion, ruled that there was not a joint venture relationship to be considered and would not give it.

Standardized Jury Instruction No. 59, Assumption of Risk, was requested by attorney for Gaddy. Objection was raised. The court

read the instruction and then the court heard objection on the part of appellee (App. 50): then the court stated that it would give Instruction No. 59. Assumption of Risk. (App. 52)

The following day the court announced out of the presence of the jury that she had decided against giving either the assumption of risk or contributory negligence instructions. At that time instructions were requested by attorney for appellant Coviello, Standardized Jury Instructions 70 and 71 (App. 28), having to do with agency and scope of employment both conceded and contested and also along with that attorney for Coviello requested the following instruction:

> "... if you find that the defendant Gaddy was under the employment of the plaintiff, either solely or with others, to operate the vehicle of Kenton Terhune, owner, and at the time and place of the accident, Defendant Gaddy was acting within the scope of such employment, then any negligence on the part of the defendant Gaddy is to be imputed to the plaintiff Ruth Terhune under such employment. And, if such negligence is a proximate or contributing cause, then your verdict must be for the defendant."

The court's recollection of the evidence was that an arrangement was made before he got in the car but this is contrary to the testimony of appellant Gaddy who testified that the understanding was not before they left the parking lot but when he started to drive when the lady said and agreed for him to drive, that she would pay him something for his time (App. 22) and that appellee Terhune was the one who asked him to drive and in fact appellant Gaddy pointed her out in the courtroom (App. 21). This was contrary to the court's recollection (App. 30).

The court ruled that the instruction would not be given because of insufficient evidence at which point concerning all the charges re-

quested, counsel for appellant Coviello began his request for exceptions:

"With all respect to the Court–

"The Court: You may have your exceptions."

The motion was renewed by counsel for appellant Coviello for a directed verdict against the appellee (App. 30) and was likewise renewed by attorney for appellant Gaddy (App. 51) both of which were denied.

Further inquiry was made whether counsel for Coviello would be permitted to argue the question of negligence as far as appellee was concerned in just picking up anybody on the streets to drive her car (App. 52, 53) and the court ruled, "yes that will be allowed" (App. 53). It was further set forth that Mr. Holford, attorney for Coviello, had made his objection on the instructions that were left out and that Mr. Smith, attorney for Gaddy, is on record to join such objections.

At this point in the trial (App. 53) the court omitted any instructions having to do with the principal-agent instruction, joint or common venture instructions, imputation of negligence instruction, assumption of risk instruction and contributory negligence instruction.

After the verdict attorneys for appellants Coviello and Gaddy moved for a judgment notwithstanding the verdict or for new trial or remittitur. These motions were denied on their face. The motion for new trial was based upon the grounds that it was against the evidence and that the court erred in failing to give proper instructions on the relative position of the driver Gaddy and the passenger Terhune, that the failure to give proper instructions was the failure to submit questions of fact to the jury for their determination and that, if the court was going to rule at all as a matter of law,

the ruling should have been that any negligence of the driver Gaddy should be imputed to the appellee Terhune. The failure to grant the motion for judgment notwithstanding the verdict or at the very least the failure to grant the instructions requested on principal-agent, joint venture, imputation of negligence, contributory negligence, assumption of risk was improper and prejudicial to the appellants Coviello and Gaddy. All these elements, when considered in the light of the facts and circumstances surrounding the operation of the Gaddy vehicle, manifestly indicate and reveal a denial of justice. Judgment was entered upon the verdict of $8,000.00 in favor of the plaintiff against both defendants and upon the verdict in favor of the cross-claimant Coviello on the cross-claim. This appeal was then noted.

SUMMARY OF ARGUMENT

Appellants contend that the court below erred in refusing to grant its motion for judgment notwithstanding the verdict and/or to grant a new trial in that it was apparent from the facts that the appellee shared in a joint and common venture with Alice Terhune on a driving expedition to the District of Columbia, for the common purpose of picking up an uncle and then returning to their area in New York; that the appellee picked up a total stranger either as a guide or an operator of her vehicle, without observing the circumstances of his condition, his ability, or his knowledge of driving; that the appellee conducted and asserted herself authoritatively as a principal in directing Gaddy to operate her car because she was sleepy and tired; that said Gaddy at the time was a total stranger to appellee and to everyone in appellee's car; that the appellee knew or should have known of the condition having to do with the complete tiredness or sleepiness of the party she requested to operate her vehicle; that the appellee assumed the responsibility of the operation of her vehicle by requesting Gaddy to operate her vehicle

and the promise of payment therefor; that such operation was in the scope of employment with appellee as principal; that said appellee was at the time a disclosed or undisclosed principal and would be responsible as principal for the acts of the agent.

Appellants contend that appellee maintained a position of requesting Gaddy to drive, sitting next to him with her arm over his shoulder. She maintained her supervision over the car by remaining with him while the others went into the hospital. She spent anywhere from an hour to an hour and a half with him through conversation and his napping and showing fatigue through tiredness, and that, in view of appellee's supervision of Gaddy, the court, as a matter of law, should have found that he was in fact the agent of appellee Terhune, that appellee knew or should have known of his fatigue or tired condition and that she knew or should have known more about the stranger Gaddy and his condition to operate a vehicle and that her failure to inquire or to know was that of a very imprudent person and as such she was contributorily negligent.

At the very least, if not ruling as a matter of law, the court erred in failing to recognize the jury as the trier of facts in this particular case. It is the duty of the court to submit all questions of fact to the jury. Here we have evidence through clear and convincing testimony on the part of defendant Gaddy that he was requested to operate the vehicle by the appellee Terhune, that he was promised payment, that he was asked to drive without question as to his ability, character or physical condition, that he remained close by and near to appellee. Under these circumstances Gaddy was a total stranger to everyone in the car. At no time did anyone reveal to him whom he was driving the car for, who owned the car, or who was to supervise him. There was evidence given by Gaddy that he was requested, during the trip, somewhere in the area of Constitution Avenue, by appellee, to drive this vehicle—which vehicle she was

driving. He complied and thereafter, upon taking the wheel demanded payment for his time. During the trip to the D. C. General Hospital appellee remained next to him as well as during the course of the return trip until the accident occurred.

Then the appellants contend that in fact this was a common and joint venture on the part of appellee and Alice Terhune, to come to Washington to pick up an uncle. Both agreed to share the driving for a common purpose, to come to Washington, to pick up an uncle and then to return to New York. They did same with the consent of the owner of the car. This, regardless of specific authority to direct, or actual direction and control, would place every person engaged in the joint venture in a responsible position as to the agent driver.

Thus, we have a party operating a vehicle, pulling into a strange parking lot, picking up a stranger, taking the control and operation of a vehicle and then turning it over to the stranger, without inquiry, with promise of payment, without previous knowledge of his driving ability, without telling him whom he was operating the car for. The stranger falls asleep or dozes at the wheel, because of his long day and feeling of fatigue and tiredness as referred to by him. For one, two or several of the aforementioned reasons appellants respectfully submit that the court could hardly turn its back on one method of instruction, for it was not the duty of Gaddy to go to the hospital to pick up the uncle. He had to be doing it for someone else. He was not doing it for himself. He was doing it for the occupants of the car. The sister-in-law sat in the back seat. The person in authority was in the front seat. It was appellee. It was she who requested Gaddy to drive, who had the opportunity to talk to him and who controlled him. For this reason, the court erred prejudicially in failing to give one or all of the requested instructions, and to let the jury determine whether one or all of them applied.

It appears from the testimony of appellee, as well as that of Alice Terhune and appellant Gaddy, that appellee assumed and portrayed herself as a principal, whether it be disclosed or undisclosed principal, either by (1) employer-employee relationship, (2) passenger control over a driver, (3) membership in a common or joint venture, (4) negligent selection of a fatigued driver. The undisputed facts show us that she was present during the acquisition of the driver, that she represented herself as a member of the party for whom she was driving, that she had control over the vehicle and apparent authority over same; that she requested him to drive because she was tired, that she maintained surveillance over the vehicle and driver during the entire trip, and lastly she maintained a position in the car next to the driver. From the above facts a jury could conclude, quite properly, that she had exercised control over the driver by directing him to drive the car, per testimony of defendant Gaddy, and that he followed her instructions by driving and operating the car in compliance with her request.

Appellee ignored all of her obligations. She alone spent from one to two hours with him, observed him, conversed with him over his employment, etc. Moreover, he testified that she saw him yawn and doze in the vehicle. Under these circumstances in a fair and impartial trial before a jury, it could and should conclude from the facts, first of all, that she was involved in a common or joint venture, that she was in the relationship of employer to driver-employee, that she was negligent in the selection of the operator of a vehicle, or that she assumed the risk of driving with a fatigued stranger? The jury having heard this set of facts and having judged them as the trier of facts would have then been in a position to impute the negligence to appellee and to find her contributorily negligent for any one of the several reasons aforementioned.

Considering the above—a party picks up a stranger to operate a vehicle which she has control of, certainly the court in its discretion should have considered a judgment notwithstanding the verdict or a motion for new trial. Appellants respectfully submit that the denial, on its face, by the court should be reversed and that this case be remanded with the direction that a judgment notwithstanding the verdict and/or new trial be granted in view of the improper, incorrect and unwarranted denial of instructions.

ARGUMENT

I

PRELIMINARY STATEMENT

Appellants respectfully submit that the court below erred in several respects. First of all, appellants contend that the evidence based on the testimony of appellee, the passenger Terhune, and the operator, Gaddy, indicates a set of circumstances which established a principal-agent relationship either through (1) a common or joint venture of appellee and Alice Terhune for a common purpose; (2) employment of operator Gaddy by appellee or occupants; or (3) passenger appellee retention of control over the defendant operator to direct the operation and control of the vehicle. It follows that any negligence on the part of the operator Gaddy should be imputed to appellee.

In addition thereto, appellants respectfully submit that appellee was also contributorily negligent in that she requested and did in fact turn the vehicle over to Gaddy for the operation of same without inquiring into his capability, his physical condition, etc. The evidence shows that appellee in fact had just endured the very set of circumstances which Gaddy had gone through. Gaddy had worked from 8:00 a.m. to 5:00 p.m. and was visiting his brother.

Appellee had left Salamanca, New York, at 10:00 a.m. and had shared the driving equally with Alice Terhune. She was sleepy and tired and she knew or should have known the condition of Gaddy and thereby failed to exercise ordinary care in the selection of a driver for the vehicle. In addition thereto, and closely related, is the question of assumption of risk. Here is a total stranger who is in the same vehicle with her and who naps and yawns and is tired and sleepy and fatigued, according to his testimony. She knew or should have known of his condition and she thereby assumed the risk of riding with a tired and fatigued person who might doze off and bring about such an accident.

All of these questions were questions to be considered by the jury. The factual evidence produced in any case is given with the ultimate purpose of permitting a jury to determine the facts. In this particular case, with all due respect to the lower court, it did not submit these issues to the jury. Mr. Gaddy was somebody's agent. He also was a stranger to the entire transaction. He was being paid. The most prominent and dominating person, according to the testimony, was appellee. She had more to do with him than any other person in the car. She maintained a position of importance by driving into the parking lot, by sitting next to the driver, by directing him to drive the car, and by staying as custodian of the car. As such she assumed the risk of a principal and likewise as a passenger who negligently selected an operator. Her conduct constituted either assumption of risk or contributory negligence.

The reversible error is that the lower court failed to instruct on any one of the aforementioned items in spite of the clear and convincing evidence which would certainly have supported the granting of a motion for a judgment notwithstanding the verdict or at the very least a new trial. The evidence when read in conjunction with the picturesque words used by all the parties reveals a relationship

separate and apart from the negligence of either of the drivers. It is a legal anomaly (1) for a party to request of another whom he sees for the first time that this person drive his automobile and despite this person's careless operation of the vehicle (2) for him to escape liability due to the action of the trial judge who withholds from the jury the opportunity to determine whether there was a joint venture, whether there was a principal-agent relationship, whether this party's conduct in turning over the car to a stranger comprised contributory negligence, whether such party assumed the risk, and whether the driver's negligence should have been imputed to the party, who now complains of the alleged negligence of a second driver. Such a deviation from normal and approved judicial procedure occurred in the court below.

II

THE COURT BELOW ERRED IN REFUSING TO GIVE AN INSTRUCTION ON ASSUMPTION OF RISK AND ON CONTRIBUTORY NEGLIGENCE IN THAT THERE WAS SUFFICIENT EVIDENCE PRODUCED BY THE WITNESSES IN TESTIMONY HEREIN TO RULE AS A MATTER OF LAW ON EITHER POINT OR AT THE VERY LEAST QUESTIONABLE FACTS FOR DETERMINATION BY THE JURY.

It is well established that the function of the jury is to decide issues of fact if reasonable men can draw different inferences. If in this particular case there are facts which create a conflict in the minds of reasonable men, then these facts should be submitted to the jury. Here the facts do create in the minds of reasonable men questions of contributory negligence or assumption of risk of plaintiff-appellee, or both.

Here is a party involved in a common or joint venture to come to Washington, pick up an uncle and return without spending any time at all in the city. There was one and one purpose only, a trip

to Washington, D.C. from Salamanca to pick up an uncle. There was an agreement to share the driving equally. One of the parties, appellee, pulls into a parking lot, selects a total stranger to operate her car, asks nothing of his background, knows nothing of his physical condition, knows nothing of his abilities, and is completely and solely in the dark. Whether she turned that car over to him at the parking lot or whether she turned that car over to him during the trip to D.C. General Hospital is immaterial. There is competent evidence for a jury to find that she was contributorily negligent. Moreover, she spends one to two hours with him in a car conversing, knowing that he is going to drive the return trip and yet they talked about their employment, etc. She has already stated she was tired and sleepy. Gaddy says that he was napping. It appears that this would cause a reasonably prudent person to be aware of the danger in the operation of the motor vehicle. These facts create an inference from the testimony that appellee knew or should have known that she was riding with a tired or sleepy person.

Under the doctrine of assumption of risk or assumed risk or under the maxim, *volenti non fit injuria*, in many jurisdictions, one who voluntarily exposes himself or his property to a known and appreciated danger due to the negligence of another may not recover for injuries sustained thereby. (65A C.J.S., Section 174, "Assumption of Risk").

The two requested instructions are embodied here together in that there was a certain similarity between the two as set out in Section 363 Assumption of Risk, 7 Am. Jur. 2d 363, "Automobiles and Highway Traffic":

> "Under the facts of particular cases it is sometimes difficult to draw the line between contributory negligence and assumption of risk with respect to motor vehicle accidents, but there is a legal distinction. Contributory negligence is based on carelessness, inadver-

> tence, and unintended events, but assumption of risk requires an intelligent and deliberate choice to assume a known risk. Assumption of risk requires knowledge by the plaintiff of a specific defect of dangerous condition caused by defendant's negligence or lack of due care which the plaintiff could have avoided, but voluntarily and deliberately failed to avoid, thereby assuming the risk of the injuries he sustained, whereas contributory negligence requires evidence only that the plaintiff failed to use the care for his own safety which an ordinary, reasonable, and prudent person would use under the existing circumstances."

This Court thoughtfully observed in the case of *Weber v. Eaton*, 82 U.S.App.D.C. 60, 160 F.2d 577 (1947), that contributory negligence depends entirely upon conduct whereas assumed risk involves a mental state of willingness, but in cases which do not arise between master and servant, the two terms may be considered synonymous in sense that one who voluntarily places himself in a perilous position when potential danger is apparent is not exercising ordinary care for his own safety.

In the Terhune case it seems that contributory negligence or assumption of the risk, or both contributory negligence and assumption of the risk might apply. Appellee was contributorily negligent because she did not exercise reasonable care in ascertaining who the operator of the car was or what his condition was. One of the contributing causes of this accident which resulted in injury to appellee herself was the clear and convincing fact that the operator of her car dozed off because of being sleepy and fatigued. It seems only reasonable that in being with him for such a long period of time this would be ascertained by the very party who turned the motor vehicle over to Gaddy. Consequently, whether knowingly or unknowingly, she acted as an imprudent party in picking up a total stranger who was fatigued and sleepy and showed little or no regard for her

own safety or the safety of her passengers. The jury could have inferred appellee's assumption of risk from her spending an hour to two hours with Mr. Gaddy while he is yawning and napping, and failure to be alerted to the clear and present danger of his driving and from her failure according to her testimony to observe even though he was a total stranger to her. Hence we find in this unique case either one or both elements of assumption of risk or contributory negligence.

Frequently we condemn intoxication because of society's feelings toward alcohol and lead ourselves to believe that this is the only incapacitating evil. Yet we know that there are drugs of numerous sorts and other means of retarding the mind temporarily. The most common, and most overlooked, is fatigue. A person who is sleepy and fatigued is as dangerous behind the wheel, if not more, than a person under the influence of drugs or alcohol. Failure to grant instructions on the grounds of contributory negligence or assumption of risk was prejudicial error to these appellants.

III

THE COURT BELOW ERRED IN REFUSING TO GIVE INSTRUCTIONS ON COMMON AND JOINT VENTURE, PRINCIPAL-AGENT AND ON THE IMPUTATION OF THE DRIVER'S NEGLIGENCE IN THAT THERE WAS SUFFICIENT EVIDENCE PRODUCED BY THE WITNESSES IN TESTIMONY HEREIN TO RULE AS A MATTER OF LAW ON THESE POINTS OR AT THE VERY LEAST QUESTIONABLE FACTS FOR THE DETERMINATION BY THE JURY.

Appellants contend that in this particular case, by the testimony of appellee and Alice Terhune, the Terhunes in fact embarked on a common or joint enterprise in coming to Washington, D.C. for a common purpose, to pick up their uncle; that each of them agreed to share the driving; that both of them had consent to operate the vehicle which belonged to the husband of Alice Terhune. They and they alone were the persons in authority in this car. The elderly

Mrs. Wells, 70 years of age, and the minor, Allen Terhune, certainly did not carry nor represent any authority for the operation of the vehicle. Since they were engaged in a common or joint enterprise, either appellee, Leona Ruth Terhune, or Alice Terhune or both were responsible for the operation of the car. They were neither guests nor gratuitous passengers. The car was placed under their control for their design and purpose. As such, either Alice Terhune or Ruth Terhune would be responsible.

We note that the testimony shows Alice Terhune sat in the rear portion of the car. The party who was really in control of this vehicle was appellee. The evidence showed agreement and joint design between appellee and Alice Terhune for a joint enterprise, giving custody and control of the vehicle to appellee.

There was an employee-employer relationship, since there was a payment being made to Gaddy to operate this vehicle. Hence there existed an agency relationship between Gaddy and appellee, his employer. The testimony shows that he was either employed at the parking lot or during the trip to the hospital. Appellant Gaddy testified that he was asked to operate the vehicle by appellee and that he was promised payment for his time; that he drove to the hospital and on the return trip had the accident when he dozed off. Certainly this is competent evidence to present a jury question on the issue of whether such an agency existed between Gaddy and the party who asked him to drive. At the very least it is a jury question.

The agency is set out clearly in 65A C.J.S. Section 172 "Master and Servant - Negligence":

> "It is a universal rule that the negligence of a servant acting as such within the scope of his employment which concurs with the negligence of a third person and contributes to cause injury to his master is im-

> puted to the master. As it has been sometimes expressed, the master assumes the risk of the negligence of the employee, ..."

Agency raises the question concerning what circumstances will allow the negligence or contributory negligence of the operator to be imputed to a passenger. In the case of *Baber v. Akers Motor Lines*, 94 U.S.App.D.C. 211, 215 F.2d 843 (1954) a wife had taken her husband's automobile with his consent and had gone to Waldorf, Maryland to visit friends. When she started home. she asked someone else to drive the car for her as she was tired. She promptly fell asleep, although there was some indication that she may have consumed alcoholic beverages during the return trip. An accident occurred in the District of Columbia while Mrs. Baber was still a passenger in the vehicle. She sued for injuries. There was a verdict for the defendant and the Babers appealed. The lower court had ruled as a matter of law that the driver Baker was Mrs. Baber's agent and for that reason the driver's negligence or contributory negligence was imputed to her. This Court stated that the negligence of the driver could clearly be attributed to the husband-owner but whether Mrs. Baber had such control over the operation and destination of the automobile as to permit the driver's negligence to be attributed to her was a jury question.

The court stated in the *Baber* case:

> "Agency with this consequence involves retention by the principal of the right of control and direction. . . . And this right of control and direction we think has to do with the operation of the car, not merely with control of the destination."

Then the court proceeded to observe that the presence or absence of the right of control was for the trier of facts to decide, *not a question of law for the court.* Therefore, the court set aside judgment against the wife-plaintiff and a new trial was awarded.

Baber v. Akers Motors Lines was cited with approval and followed in *Beck v. Washington, etc. Coach Co.*, 95 U.S.App.D.C. 150, 220 F.2d 830 (1955). This was an action arising out of an accident which occurred when an automobile following a bus crashed into it when it stopped to pick up and discharge passengers. The trial judge directed a verdict for the bus company at the conclusion of the plaintiff's evidence and plaintiff appealed. This court held that the contributory negligence of the automobile driver was properly imputable to her sister who owned the automobile and was a passenger. In affirming the trial court this court at page 151 said:

> "Miss Xenia testified that the lane to her left was clear of traffic. Nevertheless, instead of following the example of the car ahead in turning to the left, she drove straight on and hit the bus, which she had not seen until the first car turned. *Her clear negligence was properly imputed to her sister, for whom she was acting and who had the right of control.* (Emphasis added)

In support of this doctrine as italicized above, this court cited *Baber v. Akers Motor Lines, supra,* and also *Bernhardt v. City & S. Ry. Co.*, 49 App.D.C. 265, 263 F. 1009 (1920).

Bernhardt was an action for injuries in a collision between a street car and a motor truck conveying a party of boys and girls which included plaintiffs. According to the evidence, the owner of the truck, at the request of his nephew, one of the party, sent the driver to give the party a ride. This court held, *inter alia,* (1) that whether the driver of the truck on which plaintiffs were riding was their agent and subject to their control and direction was a jury question, (2) that an instruction that the driver's negligence was not imputable to plaintiffs was properly refused, (3) that the negligence of the driver was imputable to plaintiffs as passengers of the truck when it was struck by the street car, if the driver was their agent or representative, and, as such, subject to their directions.

In this connection we refer to *National Trucking & Storage Co. v. Driscoll*, 64 A.2d 304 (1949). In this case the Municipal Court of Appeals for the District of Columbia held that contributory negligence of a bailee was attributable to a bailor, so as to bar recovery by the bailor from a third person.

Another case supporting the contentions of appellants is *Weber v. Eaton*, 82 U.S.App.D.C. 66, 160 F.2d 577 (1947). This court there said that an automobile passenger may be contributorily negligent because of his own failure to use due care, apart from imputation to him of the driver's negligence. This court held that (1) if the driver consumes alcohol before driving, (2) if the passenger knew of this fact before he entered the car, (3) if the driver's drinking caused his negligent conduct, and (4) if this conduct caused the injuries to the passenger, then (1) the passenger assumed the risk by voluntarily riding with the driver and (2) the passenger could not recover for his injuries.

Weber v. Eaton is cited in several opinions. *Uline Inc. v. Sullivan*, 88 U.S.App.D.C. 104, 107, 187 F.2d 82, 85 (1950) cited it on the point of assumed risk. *Quisenberry v. Herman*, 100 U.S.App. D.C. 144, 145, 243 F.2d 250, 251 (1957) cited it and held to be for jury resolution a conflict in the evidence as to whether the driver was in fact under the influence of alcohol she had consumed and whether she had operated the car negligently. *Todd v. Jackson*, 109 U.S.App.D.C. 7, 9, 283 F.2d 371, 373 (1960), also cited the *Weber* opinion. In this case plaintiff was a passenger in a car which collided into another vehicle. This court held the issue to be that of contributory negligence because the plaintiff became a passenger, knowing that the driver had imbibed and was drunk. *Casper v. Barber & Ross Company*, 109 U.S.App.D.C. 395, 400, 288 F.2d 379, 384 (1961) also cited the *Weber* opinion. In *Casper* plaintiff was injured while riding on top of an elevator. This court held that

whether plaintiff assumed the risks involved and whether he was contributorily negligent were questions for the jury.

Pertinent to the basic fact situation in the instant appeal is the recent case of *Emery v. Northern Pacific Railroad Company*, 370 F.2d 1009 (8 Cir. 1967). On a certain Sunday a pastor drove his car to a certain town to perform his regular pastoral duties there. As was his custom, he took with him his wife and another lady to serve as Sunday school teachers and his children and some other children for Sunday school attendance. For such occasional use of his personal automobile, the pastor received a flat monetary allowance. A certain bishop, head of the pastor's church in the state, accompanied the pastor on the trip for the purpose of making his annual visit at the pastor's church. Upon the return trip the vehicle collided with a train and the bishop was killed. In the ensuing wrongful death action, the railroad's defense was that of joint enterprise and the resulting imputation to the bishop of the pastor's contributory negligence. The court held that the essential elements of a joint enterprise are (1) a common purpose and community of interests in the object of the enterprise and (2) an equal right in the driver and the passenger to control each other's conduct with respect to the operation of the automobile. The court further held that the presence of each such element of a joint enterprise is a question for the jury, if there is evidence to support each element. At page 1014 the court suggested that if the bishop-passenger had "made an arrangement or agreement giving him a right to participate in the control of the automobile, or that the Bishop at any time actually exercised any control" then the law as to what constitutes joint enterprise would apply.

Likewise in our case we have appellee here who is the operator of a vehicle when it enters the city and is the driver when the stranger Gaddy assists the occupants. His testimony is that he

assisted under the instructions or request of appellee. She directed him to drive. She sat next to him. She certainly had the right to control as a principal. Based upon the evidence in this case, it was. under the *Baber* and other cases, a question of fact to be decided by the jury whether appellee had the right of control.

In any of the above instances, whether as a member of a joint venture, as a principal over an agent driver or as an employer of the driver, or as a doer of a negligent act of selection of the driver, this imputed negligence to appellee should have barred recovery. The court by its failure to grant the requested instructions denied appellants their right to have the facts tried by a jury. Also see 65 C.J.S. "Negligence" Section 168(4) Occupants in General:

> "Contributory negligence of the operator of a vehicle is imputed to an occupant where she has control of the vehicle or of the conduct of the operator thereof, or where the operator is the agent of the occupant, but the rule is otherwise where the occupant does not have or assume the right of control or does not cooperate in the management of the vehicle."

IV

THE COURT ERRED IN FAILING TO GRANT JUDGMENT NOTWITHSTANDING THE VERDICT AND/OR TO GRANT A NEW TRIAL ON THE GROUNDS THAT THE VERDICT AGAINST THE APPELLANTS WAS CONTRARY TO THE OVERWHELMING WEIGHT OF THE EVIDENCE AND THE LAW.

In considering the strength of the evidence in this case, the questions might arise whether reasonable men could differ concerning whether Gaddy was an agent of appellee through employment, through control of both the vehicle and his driving, and through her selection; whether appellee was contributorily negligent in the selection of this stranger; and whether appellee knew or should have known that Gaddy was tired and sleepy and thus assumed the risk

of riding with such an operator. If any one of the aforementioned questions can be answered in the affirmative, reasonable men could not differ, and it is then appellants' contention that the court should have granted judgment for the defendants notwithstanding the verdict.

It is appellants' further contention that if the answers to the questions above cannot be answered in the affirmative but that reasonable men could differ as to the answers then, in that event, the questions should have been submitted to the jury and the lower court erred in not granting a new trial on the issues. We find from the court record itself that the court had planned on giving an instruction as to imputation of negligence of Gaddy as an agent of appellee (App. 27, 28) and so stated that she thought it was a jury question so as to warrant the proper instruction coupled with an explanation of joint venture. In fact, the court made the following statement (App. 47) of the proposed instruction to the jury:

> "If you find that the driver of the vehicle, in which the plaintiff was a passenger, negligently and proximately contributed to the causing of this accident, and if you further find that the plaintiff and the driver were joint venturers, which term I will now define, then the driver's negligence must be imputed to the plaintiff-passenger, and said passenger may not recover. When two or more persons are engaged in an activity in which they are acting in pursuit of a common purpose and in which they have a mutual interest and a joint right of control, they are engaged in what is known as a joint venture or enterprise. When a joint venture or enterprise exists, each member is deemed to be acting for all other members, with the result that the negligence of one member of a joint venture or enterprise is imputed to all of the other members. The jury should note that a joint venture relationship is one which necessarily arises from some agreement between the parties either

> expressed or reasonably implied, by virtue of which they undertake to share equally the responsibility for and the right to the management of the enterprise. This relationship is not one that can spring up intentionally, nor is it one that can be arbitrarily imposed. It is essential that parties to a joint venture be in pursuit of a common object and act for common purpose. If you find, however, that the plaintiff and the driver of the car in which she was riding were not joint venturers, then the plaintiff is not legally responsible for her driver's conduct. And if she, herself, is free from contributory negligence, any valid claim for relief which she might have is not barred by the negligence, if any, of the driver."

The court, again (App. 52), decided she would give an instruction on Assumption of Risk and, the following day, prior to the charge, there was complete reversal and none was to be given. Counsel thinks a possible explanation is the court's recollection of the evidence as per App. 30, and testimony that Gaddy said arrangements were made before he got in the car. The judge did not believe that it was made before he started to drive. This recollection is erroneous, as seen in the testimony of appellant Gaddy. At App. 21 the evidence showed that appellee drove the car from the parking lot. At that time Gaddy was sitting on the right side of the car. During the trip, in the vicinity of Constitution Avenue, appellee asked him to take over. When asked whether he would be paid for directing the people, before they left the parking lot, Gaddy testified that "*when I started driving* the lady said she'd pay me for my time". (App. 22)

As a result of the aforementioned errors, these appellants were denied a fair and impartial hearing because of the court's failure to direct a judgment for the defendants notwithstanding the verdict or failure to grant a new trial and for failure of the court to instruct the jury properly.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the judgment of the court below should be reversed and the case remanded for entry of judgment for the defendants Coviello and Gaddy or that the case be remanded for a new trial with proper instructions and charges to the jury.

Respectfully submitted,

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Washington, D.C. 20036
927-7600
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Attorney for Appellant Gaddy

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,515

FRANCIS G. COVIELLO
and
WILLIAM ALFRED GADDY

Appellants

v.

LEONA RUTH TERHUNE

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

APPENDIX

Washington, D. C. THIEL PRESS 202 393-0826

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IN THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

LEONA RUTH TERHUNE,
Plaintiff

vs. Civil Action No. 1390-66

WILLIAM ALFRED GADDY and
FRANCIS G. COVIELLO,
Defendants

Relevant Docket Entries

1966

May 26 - Complaint, appearance and Jury Demand.

June 21 - Answer of defendant #2 to complaint; c/m 6/20/66 appearance of Holford and Caulfield.

October 7 - Answer of defendant #1 to complaint;c/m 10/7/66; appearance of John Louis Smith, Jr.

1967

May 14 - Pretrial proceedings, Asst. Pretrial Examiner.

1968

September 13 - Verdict and judgment for plaintiff v. both defendants in the sum of $8,000.00, without costs (N) Judge Green.

September 13 - Instructions of plaintiff and defendant #2.

September 23 - Motion of defendant #1 to set aside judgment and to enter judgment for defendant, notwithstanding the verdict; motion for new trial and motion for remittitur; c/m 9-23-68; M.C. filed.

September 24 - Motion of defendant William Alfred Gaddy to set aside judgment and to enter judgment N.O.V., motion for new trial and motion for remittitur, denied. (fiat) (N) Judge Green.

September 24 - Motion of defendant Francis G. Coviello to set aside judgment and to enter judgment N.O.V., motion for new trial and motion for remittitur, denied. (fiat) (n) Judge Green.

October 1 - Transcript of proceedings; September 11 and 12, 1968 Court's copy. (Rptr: Martha V. Miller).

October 1 - Transcript of proceedings; September 12, 1968, Vol. 2. Court's copy. (Rptr: Martha V. Miller).

October 16 - Notice of appeal by defendants from order of 9/24/68. Copy to Daniel L. O'Connor.

[Filed May 26, 1966]

[Caption Omitted in Printing]

COMPLAINT FOR DAMAGES-PERSONAL INJURIES

1. Jurisdiction in this case is based on Title 11, § 306, D. C. Code (1961 ed.) as amended, and the amount in controversy exceeds the sum of $10,000.

2. Plaintiffs Kenton Terhune and Ruth Terhune are adults, husband and wife, and residents of the State of New York. Defendants William Alfred Gaddy and Francis G. Coviello are adults and residents of the District of Columbia.

3. On or about to-wit May 30, 1963, plaintiffs were passengers in a motor vehicle being operated in a Westerly direction on R Street, N. W., in the District of Columbia by defendant Gaddy when, at the intersection of 15th and R Streets, N. W., the said defendant recklessly, negligently and in disregard for the safety of the plain-

tiffs, failed to observe a blinking red light controlling Westbound traffic on R Street and caused said vehicle to be in a collision with a vehicle proceeding in a Northerly direction on 15th Street, N. W. and operated by defendant Coviello. At the time of said collision, visibility was restricted by rain, and both defendants were operating their vehicles at an unreasonable speed and in violation of the Motor Vehicle and Traffic Regulations of the District of Columbia.

4. As a result of said collision, plaintiff Ruth Terhune suffered a large hematoma of the dorsum of the right hand; contusions and swelling of the right side of the head; pain, stiffness and soreness of the dorsal region of the back and neck; contusion of the upper abdomen; large contusion of the lower left breast and lower ribs on the left; contusion of the right leg and second and third fingers of the right hand and right elbow; sharp pain in mid-back with motion; dizziness and shock. A condition of sciatic neuritis has developed in the right side of her body, which condition is permanent.

5. Plaintiff Kenton Terhune, as a result of said collision, sustained injuries to his body consisting of contusions, muscle spasms and sprains, has been deprived of the consortium of his wife, and has been caused to expend large sums for medical treatment for his said wife.

6. By reason of the said negligence of defendants, both plaintiffs have been damaged to the extent of $15,000 each.

WHEREFORE, the premises considered, plaintiff Kenton Terhune demands judgment against both defendants in the amount of $15,000 and the plaintiff Ruth Terhune demands judgment against both defendants in the amount of $15,000, together with costs of this suit.

[Subscription Omitted in Printing]

JURY DEMAND

Plaintiffs hereby demand trial by jury.

[Subscription Omitted in Printing]

[Filed June 21, 1966]

[Caption Omitted in Printing]

ANSWER OF FRANCIS G. COVIELLO ONLY

FIRST DEFENSE

Defendant Coviello admits that on or about May 30, 1963 at or near the intersection of 15th and R Streets, N. W. a collision occurred between a vehicle operated by William Alfred Gaddy and owned by Kenton Terhune and a vehicle operated by Francis G. Coviello, but denies each and every other allegation contained therein. Defendant Coviello admits that defendant Gaddy recklessly, negligently and carelessly disregarded the blinking red light controlling west bound traffic on R Street, but denies every other allegation.

SECOND DEFENSE

Defendant Coviello alleges that any damages or injuries sustained by the plaintiffs were caused by their contributory negligence.

THIRD DEFENSE

Defendant Coviello alleges that any damages or injuries sustained by the plaintiffs were caused by the negligence of a third party.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

[Filed October 7, 1966]

[Caption Omitted in Printing]

ANSWER OF DEFENDANT WILLIAM ALFRED GADDY

Comes now the defendant, William Alfred Gaddy, by his counsel, and in answer to the Complaint filed herein states:

1. That the Complaint filed herein fails to state a cause of action upon which relief can be granted.

2. That the defendant William Alfred Gaddy admits the allegations contained in paragraph 1 and that part of paragraph 2 which alleges William Alfred Gaddy is a resident of the District of Columbia; alleges that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraphs 4 and 5; and denies each and every other allegation contained in the Complaint.

3. Defendant denies that he is guilty of any negligence whatsoever, or that that he was one of the proximate causes causing any injuries, if any, suffered by the plaintiffs, but if the plaintiffs suffered any injuries, said injuries were caused by the negligence of the defendant, Coviello, and said injuries, if any, suffered by plaintiffs, were caused solely by the negligence of the defendant, Coviello, and the aforementioned negligence was the sole and proximate cause of any injuries, if any, suffered by plaintiffs.

4. The defendant further alleges as a separate defense that the plaintiffs were contributorily negligent in failing or neglecting to exercise any care or caution for their own safety; in failing or neglecting to advise the driver that they saw an unsafe condition presenting itself. That such negligence, combining and concurring with any negligence on the part of the defendant, Gaddy, which is admitted solely for the purposes of this defense, contributed as a

direct and proximate cause of the accident, damages and injuries complained of.

5. The defendant further alleges as a separate defense that any damages the plaintiffs sustained were due to, or contributed to, by the negligence of the plaintiffs themselves in that they assumed the risk in connection with the accident alleged to have given rise to their injuries.

WHEREFORE, defendant William Alfred Gaddy prays:

A. That the Complaint filed herein be dismissed and costs be assessed against the plaintiff.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

[Filed May 14. 1967]

[Caption Omitted in Printing]

PRETRIAL PROCEEDINGS

Negligence action for personal injuries.

UNDISPUTED FACTS:

On May 30, 1963, at about 1:40 a.m., P Ruth Terhune was a passenger in a car driven by D Gaddy in the westerly direction on R Street, N.W., at the intersection with 15th Street, in the District of Columbia. At the same time D Coviello was operating an automobile north on 15th Street. The two cars collided at the intersection of 15th and R Streets, N.W.

The intersection was controlled by traffic lights, which at the time of the accident were flashing red for traffic on R Street

and flashing yellow for traffic on 15th Street. It was dark, misting and the pavement was wet.

PLAINTIFF asserts that the collision and her resulting injuries and damages were caused by the following negligence (common law plus violation of regulation where cited) of Ds:

As to Both Defendants:

Failure to control vehicle so as to avoid colliding (§22a)

Failure to slow down for intersection (§22c)

Failure to give full time and attention to driving (§99c)

As to Defendant Gaddy:

Failure to obey flashing red "Stop" signal (§13a)

Failure to proceed with caution on Stop signal (48)

As to Defendant Coviello:

Failure to drive with lighted headlights (§118)

Reckless driving (§21a)

PERSONAL INJURIES:

Large hematoma of the dorsum of the right hand

Contusions and swelling of the right side of the head

Pain, stiffness and soreness of the dorsal region of the back and neck

Contusion of the upper abdomen

Large contusion of the lower left breast and lower ribs on the left

Contusion of the right leg and second and third fingers of the right hand and right elbow

Persistent pain in the mid-back with motion

Dizziness

Shock

Permanent (P was 38 years of age at the time of the accident)

Plaintiff claims residual stiffness and pain in the cervical region, right leg and mid-back with a sciatic neuritis of the right side, and that these conditions have persisted since May 30, 1963, and are therefore considered permanent.

[No medical report at Pretrial in support of permanent injury, but counsel for P states he is getting up-to-date report.]

Counsel for plaintiff stated at pretrial that he is dropping the claim of P Kenton Terhune for personal injuries and loss of consortium; but counsel for Ds did not consent to dropping of this P as a party at this time.

SPECIAL DAMAGES:

Dr. Ruth R. Knobloch	$ 187.60
Dr. Howard L. Stoll, Sr.	16.00
Salamanca Hospital (X-rays)	37.50
Dr. D. E. Kamholtz	30.00
Prescriptions	180.00
	$ 451.10

Inability to perform farm chores – from the accident to date: ($50.00 per month)

1963	$350.00	
1964	600.00	
1965	600.00	
1966	680.00	
1967	600.00	
1968	250.00	
		$3,000.00

Assistance with household work – reasonable value of ironing and cleaning 100.00

Total special damages to date $3,551.00

DEFENDANT GADDY denies all allegations of negligence on his part.

He asserts that he was operating a motor vehicle owned by plaintiffs, at the request of plaintiffs; that at the intersection of 15th and R Streets, N.W., P, driving west on R, paused at a blinking red light, and seeing no traffic coming, started to drive across 15th Street; that after he was half-way across, he was struck by a car driven by D Coviello, who was proceeding at a great rate of speed and driving without his headlights on.

D contends the collision and any injuries or damages resulting to plaintiffs were caused by the sole negligence of D Coviello (common law plus violation of regulation where cited) as follows:

Failure to give full time and attention to driving (§99c)

Driving at an excessive rate of speed:
Under the circumstances (§22a)
In excess of speed limit (§22b)
Failure to slow down for intersection (§22c)

Driving at night without his headlights on (§118)

Failure to keep vehicle under control so as to avoid colliding (§22a)

Failure to keep a proper lookout

DEFENDANT COVIELLO denies all allegations of negligence on his part; he asserts that the collision and any injuries and damages resulting to plaintiffs were caused by the sole negligence (common law plus violation of regulation where cited) of who at the time accident was acting as Ps' agent, Defendant Gaddy as follows:

Failure to give full time and attention to operation of vehicle (§99c)

Disobeying flashing red light (§13a)

Travelling at an unreasonable rate of speed under the circumstances (§22a)

Failure to slow down for intersection (§22c)

Failure to yield right-of-way at "Stop" light
(§48)

Coviello denies P suffered injuries and damages of the nature and to the extent alleged.

CROSSCLAIM (Coviello vs. Gaddy)

DEFENDANT Coviello crossclaims against D Gaddy for contribution as to any amount recovered by P against him, that, if he be held negligent, the collision was caused by the concurrent negligence of D Gaddy, as specified above.

D Gaddy, as cross-D, denies any liability to D Coviello, asserting that the collision was caused by the sole negligence of D Coviello, as specified at page 4.

STIPULATIONS:

Facts under UNDISPUTED FACTS.

It is stipulated that the following may be admitted without formal proof of authenticity, subject to all other objections:

D. C. Traffic regulations

HEW Mortality Table

Any documents initialled by all counsel prior to trial.

Counsel agree to exchange within one week copies of all medical reports to date not heretofore furnished, if any, and to exchange promptly and prior to trial any additional medical reports which may be obtained.

Counsel for P agrees that Ds may have a further medical examination of P wife, by a physician of D's choice, and agrees to make her available in the District of Columbia not later than 3 days prior to trial for such purpose.

Counsel for P states that, in addition to the parties, the following possible witnesses are now known to him:

Alice Terhune
Salamanca, New York

Dr. Rugh R. Knobloch
208 Court Street
Little Valley, New York

Pvt. Walter B. Hill
Metropolitan Police Department

Counsel for D Coviello states that the only additional witnesses now known to him are:

Officer James F. Traner
Metropolitan Police Department

Dr. Everett J. Gordon

Any other examining physician for D, to be designated

Counsel for D Gaddy states that he knows of no other witnesses at this time.

If any counsel should learn of any additional witnesses prior to trial, including experts, exclusive of impeachment or rebuttal witnesses, he will file a supplemental witness list with the Clerk not later than one week prior to trial.

The Examiner has requested counsel to come to the trial with the maximum authority to settle the case which will be allowed them by their principals.

Asst. Pretrial Examiner

[Filed September 13, 1968]

[Caption Omitted in Printing]

DEFENDANT COVIELLO INSTRUCTION NO. 4

A passenger in an automobile by her own conduct may be contributorily negligent, with the result that any recovery by her for injuries or damages sustained in the accident will be barred. However, before the passenger's contributory negligence will have such

effect, her negligent conduct must proximately cause or participate in causing either the accident or her injuries.

If you find that Mrs. Terhune failed to exercise due care for her own safety and protection and acquiesced in the operation of the vehicle by Gaddy, who at that particular time was not in proper condition to be operating a car, and that she failed to properly turn over the driving chores to a person knowing the prevailing conditions, and yet in spite of such conditions placed herself in an unsafe position, and that such action, or failure to act, caused or combined to cause either the accident or her own injuries, then your verdict must be for the defendant Coviello.

[Subscription Omitted in Printing]

McManus v. Rogers, 173 F. Supp. 118 (D.C.D.C.)
Todd v. Jackson, 109 U.S. App. D.C. 7, 283 F.2d 371
Weber v. Eaton, 82 U.S. App. D.C. 60, 160 F.2d 577

[Filed September 24, 1968]

[Caption Omitted in Printing]

MOTION TO SET ASIDE JUDGMENT AND TO ENTER JUDGMENT FOR THE DEFENDANT, FRANCIS G. COVIELLO, NOTWITHSTANDING THE VERDICT, MOTION FOR NEW TRIAL AND MOTION FOR REMITTITUR

Comes now the defendant, Francis G. Coviello, and moves this Honorable Court to set aside the verdict and judgment entered for the plaintiff, Ruth Terhune, notwithstanding the verdict by the jury, and/or in the alternative, that the Court grant to the defendant, Francis G. Coviello, a new trial or that this Court order a remit-

titur, and as reasons therefore states:

1. The verdict is contrary to law.

2. The verdict is contrary to evidence.

3. The verdict is contrary to the law and the evidence.

4. The evidence shows, and the verdict of the jury reveals, that both Francis G. Coviello and William Alfred Gaddy were concurrently negligent, but such evidence further reveals that the factual situation was through the assumption of risk doctrine, through the theory of agency, or through the instruction of joint or common venture. Such concurring negligence on the part of the defendant Gaddy would have been barred recovery by the plaintiff, Ruth Terhune.

5. The Court erred in denying the defendant Coviello's motion to direct a verdict in his favor at the close of all the evidence.

6. There was no sufficient or substantial evidence tending to support the amount of the jury's verdict; that the main evidence heard was self-serving and without medical support, that the real test of Ruth Terhune's condition prior to the accident was denied access into evidence by the Court from the examination of her own doctor.

7. The Court erred in not giving the jury proper instructions on the doctrine of assumption of the risk, on the instruction of joint or common venture, and on the theory of agency based upon principal agency as brought out by the evidence submitted during the case.

8. The Court further erred in charging the jury concerning permanent injury, admitting into evidence the HEW tables and by mis-quoting a stipulation entered into by counsel.

9. The Court erred in failing to advise the jury concerning the mentioning of sums to the jury by counsel for plaintiffs which were unsupported and unrelated to the accident.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

[Excerpts from Transcript of Proceedings]

September 11, 1968
Washington, D. C.

[3] ALICE TERHUNE

* * *

MR. O'CONNOR: May it please the Court and counsel, I would like to call your attention to the fact that Mrs. Alice Terhune has a little hearing difficulty and I am going to ask if she does not understand the question that she ask that it be repeated.

* * *

DIRECT EXAMINATION

BY MR. O'CONNOR:

Q. Mrs. Terhune, if you speak up so that I can hear you in answer to the questions, why, then the members of the jury will definitely be able to hear you.

Will you state your name, please? A. Alice Terhune.

Q. And you are married? A. Yes.

Q. And who is your husband? A. Kenton Terhune.

Q. And where do you live? A. Salamanca, New York.

Q. And the address? A. 431 Crawford Street.

Q. Salamanca, New York? A. Yes.

Q. Now, do you drive an automobile? [4] A. Yes, I do.

MR. O'CONNOR: She reads lips, so I think I will stand here, if that is all right.

BY MR. O'CONNOR:

Q. Directing your attention to May 29, 1963, did you have occasion to come to Washington? A. Yes.

Q. And did you ask Ruth Terhune to accompany you? A. Who was with me?

Q. To come with you? A. Yes; my mother, Mrs. Wells and my sister-in-law, Ruth Terhune, and my son, Allen Terhune, and myself.

Q. And did you ask Ruth Terhune to come with you? A. Yes, I did.

Q. Why did you ask her to come with you? A. I wanted her to help me drive and to have company.

Q. Why were you coming to Washington? A. To get my uncle, William Maylard. He had run away and we had to go down and bring him home.

* * *

Q. The Court asked that you speak a little more slowly, if you will, please? A. He was in the hospital down there, but they picked him up when he went to Washington; that's where he lived.

Q. Well, now, about what time did you leave Salamanca? About what time in the morning? [5] A. Ten o'clock, I believe.

Q. And you drove straight through to Washington? A. Yes.

Q. And did Ruth Terhune alternate with you on driving? A. Yes.

Q. I see. Now, when did you arrive in Washington? A. In the evening.

Q. About what time? A. I know it was in the evening but I can't say exactly.

Q. Was it still daylight or was it dark? A. I think it was dark.

Q. Now, did you know where the hospital was? A. No, we didn't.

Q. And what did you do to try to find the hospital? A. Well, we drove around and asked, but we got the wrong directions. So we come to this here parking lot and we asked directions there. Well, they couldn't tell us. And so my mother, Mrs. Wells, asked one of them if they could take us to this here hospital. So this one fellow, he suggested he would take us.

Q. And is that Mr. Gaddy? A. Yes.

Q. And who was driving the car at the time you stopped at this parking lot? A. Ruth Terhune.

* * *

[6] Q. And after Mr. Gaddy agreed to go with you, who drove the car? A. Mr. Gaddy; he drove.

Q. Did he drive you to the hospital? A. Yes.

Q. And how long were you at the hospital? A. About and hour and 50 minutes, I think; something like that.

Q. Who went in the hospital with you? A. Mrs. Wells and myself.

Q. The two of you went in the hospital? A. Yes.

Q. Then you were able to obtain your uncle's release? A. Yes.

Q. You were able to get him out of the hospital? A. Yes. We had to wait. They didn't want to let him out right away; he was sleeping. So we had to wait quite a little while.

Q. Now, after you all got him out of the hospital, you all got back in the car? A. Yes.

Q. What were your intentions? A. Well, we had this Mr. Gaddy to take us out so we would know on the road to go home — right route.

Q. You were going to go back to Salamanca that night? A. Yes.

Q. Are you familiar with the streets of Washington? A. How's that?

[7] Q. Are you familiar with the streets of Washington? A. No, I am not.

* * *

[8] Q. Where were you seated in the automobile after it left the hospital? A. In the rear, on the right side.

Q. And who was in the seat in the rear seat with you? A. Allen Terhune and William Maylard.

Q. Who is Allen Terhune? A. My son.

Q. And Mr. Maylard was your uncle? A. Yes.

Q. Now, just prior to the accident, did you observe anything? Were you watching the street or paying attention to the driving? A. Well, no; I wasn't really paying any attention — well, no.

Q. Who was driving the car at this time? A. Mr. Gaddy.

Q. And do you recall him proceeding west on "R" Street? A. Yes.

Q. And can you tell the Court what happened as you were driving west on "R" Street? A. Well, there come along — there was a stop light and we stopped.

Q. What type of light was it? A. It was a flashing signal; it was late at night and it was flashing.

Q. What color was the light? A. It was yellow, I think — yellow light.

[9] Q. And what did Mr. Gaddy do? A. He came to a full stop. And then we started ahead, proceeding — you know, going ahead.

Q. Across the intersection? A. Yes.

Q. And what happened then? A. Well, this here car come so sudden, we didn't really see it because it didn't have no lights. We couldn't really see it; it come so quick, you know.

MR. HOLFORD: Would the Court pardon me again?

The witness is testifying what "we" saw in this particular instance. Could we have the witness testify as to what she saw?

BY MR. O'CONNOR:

Q. Your testimony is what you saw? A. Yes.

Q. And what you have just testified to, is that what you saw? A. It come so quick I didn't know it was coming — the way it happened, you know. But I didn't see no lights; that's why I didn't see it coming.

Q. What were the weather conditions at that time? A. It was misty, foggy-like.

Q. Could you see very far? A. Well, you could see pretty good — yeah, you could see.

* * *

[10] Q. Your mother was in the front seat? A. Yes; she was by the door. And Ruth was in the middle.

* * *

[12] Q. Now, what did you do after the accident? A. Well, we — I got out and seen what happened. And I tried to get the names, and everything, and I was really awful nervous, too.

Q. Did you get the names of any witnesses? A. No, nobody. I didn't have nothing to write on.

Q. How many occupants of the other car were there? A. Other what?

Q. Of the other automobile? A. Two.

Q. Did you get the names of the people that were in that car?

[13] A. I got his name. But the other —

Q. Whose name? The driver? A. The driver, yes.

Q. What about the other passenger? A. They disappeared. I didn't see right after —

Q. Was it a man or woman? A. A woman.

Q. Did you have any discussion or any conversation with the driver of the other car? A. He wouldn't pay no attention to me. I got his name and that was all. Nobody wouldn't bother with me. They just, you know — (indicated)

Q. Now, did the police come afterwards? A. Yes.

* * *

Q. Now, this uncle that you came down to get; that was your family, is that correct? A. Yes.

[14] Q. And do I understand your testimony that you asked Ruth Terhune to help you drive down here? A. Yes.

* * *

CROSS EXAMINATION

BY MR. HOLFORD:

Q. Mrs. Terhune, I am going to speak from here and I will try to speak slow so that you can hear me. I will try to speak distinctly.

Did you, yourself, have consent to operate this vehicle that you were riding in on this particular day? A. I didn't get it?

Q. Did you have consent to operate this vehicle that you were using to come to Washington, D.C. on this particular day? A. I drove and then my sister-in-law; we would take turns driving.

* * *

[15] Q. Now, did Ruth Terhune, or Leona Ruth Terhune, have permission to drive the car on this particular occasion? A. Yes.

Q. Now, did Ruth Terhune drive the vehicle away from the parking lot after Mr. Gaddy had gotten into the car? A. No.

* * *

[17] Q. Now, up front you had Mr. Gaddy driving? A. Yes.

Q. Mrs. Ruth Terhune sitting in the middle? A. Yes.

Q. And Mrs. Wells was sitting next to the door, so that there was also three passengers up front? A. Yes.

* * *

[26] WILLIAM F. GADDY

was called as a witness by the Defendant Coviello and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. HOLFORD:

Q. Mr. Gaddy, would you give us your name and address? A. William A. Gaddy, 1706 "R" Street, Northwest.

Q. And where are you employed, Mr. Gaddy? A. Where am I employed?

Q. Yes? A. 633 Indiana Avenue.

Q. On the particular day involved — May 29 is when I will begin — the accident happened on the 30th — but this was on the 29th; I will ask you did you go to work on that particular day? A. Yes, I did.

Q. What time of morning did go to work? A. You talking about the 29th?

Q. Yes? A. 8:00 to 8:30 to 5:00 — something like that. I didn't work eight hours.

MR. HOLFORD: And before I proceed further, The Court recognizes that I will call Mr. Gaddy, supposedly, [27] as a hostile witness.

THE COURT: All right.

BY MR. HOLFORD:

Q. Now, after you finished work, did you drop by to see your brother, who works in the 1300 block of Connecticut Avenue? A. Yes.

Q. Well, sometime that particular evening, did a car pull into your parking lot — to your brother's parking lot? A. Yes.

Q. And at the time the car pulled in, tell the ladies and gentlemen what you were doing if anything, other than just visiting your brother? A. We were just sitting around talking.

Q. You do this quite frequently after you get off? A. See, I go by there on my way home.

Q. Now, this car that drove in, did you observe the person who was driving the car? A. Yes.

Q. Is that the plaintiff here, sitting over here? (indicating) A. Yes.

Q. Did they inquire of you about the location of the D.C. General Hospital? A. Well, they asked my brother.

Q. Then who asked you about it? A. My brother was — he asked me if I would go with [28] them since directions were so hard to follow.

Q. From the parking lot, D.C. General was actually on the other side of the city, so to speak? A. Right.

Q. When you got into their car, which side of the car did you get into? A. Right side.

Q. And did Mrs. Ruth Terhune drive the car out of the parking lot and begin to go over their driving herself? A. Yes, I think she did.

Q. All right, so that you were sitting on the right side; who was sitting in the middle? A. Mrs. Wells, I believe.

Q. And Mrs. Terhune was the driver? A. Yes.

Q. During the trip over to the hospital; did anything happen down in the area of Constitution Avenue? A. Somewhere she said she was tired.

Q. Who, Mrs. Terhune? A. Mrs. Terhune, the driver, yes, and asked me if I would take over.

Q. So it was Mrs. Terhune who asked you to take over because she was tired? A. Yes.

Q. Did you take over? A. Miss Wells, I think it was, agreed.

[29] Q. So she asked and Mrs. Wells agreed? A. Or her sister-in-law one.

Q. And did you then get out of the right side of the car and go around to the left side? A. Yes.

Q. What did the two women do in the front seat? A. (No response)

Q. Did they shove over? A. Yes.

Q. All right, so from that point on, you drove to D.C. General Hospital? A. Right.

Q. Did you have an understanding before you left the parking lot, that you were going to be paid for directing these people over there and back and taking your time? A. Well, when I started driving, whenever the lady said — agreed for me to drive, said she would pay me something for my time.

Q. Now, when you got over there to the hospital, did Mrs. Terhune sit in the car with you? A. Yes, sir.

Q. Now, up until this point, from the time you first agreed to go with them until the time you got over to the hospital, and here you and Mrs. Terhune were sitting in the car, the other people went inside the hospital, right? [30] A. Yes.

Q. Had they ever asked you anything about yourself? I am not talking about afterwards; but before you started driving, did they ever ask you how long you had lived in the area and where you worked; do you have a driver's license; anything of that nature? A. I don't remember.

Q. And do you recall what time Mrs. Ruth Terhune drove out of the parking lot, where your brother works, what time of night it was? A. I don't recall, but it was after dark. I had been there quite awhile.

Q. Did you, while you were over at the hospital, inform Mrs. Terhune that you had worked all that day and that you were tired and sleepy? A. I don't recall. She was explaining her farm work and I was explaining my kind of work to her.

Q. And then you began to drive back; could you give us some idea of how long you waited before you began to drive back? A. It must have been — I know it was between an hour or two — between an hour and two hours.

Q. And could you give the ladies and gentlemen some idea of how you felt at that time; in this way, I am relating to your being tired and fatigued and sleepy. Were you at that time tired and fatigued and sleepy? A. Yes; because it was raining when we went to the hospital, and I think I took a nap while I was [31] waiting.

Q. And did Mrs. Terhune sit in the same car with you while this was happening? A. Yes.

Q. As you drove over, you passed 14th and "R" Streets and approached 15th and "R" Street; do you have any recollection of whether or not you paused, or stopped, or what happened at that light about 15th and "R" Streets? A. I couldn't be exactly sure. I know I slowed down, possibly, maybe almost stopped. I may not have come to a complete stop.

Q. Do you recall hearing some shouting in your car? A. Yes.

Q. And at that time, could you tell the ladies and gentlemen of the jury, had you dozed off at that time? A. Possibly, I don't know.

* * *

Q. And when you came out of it — A. When I heard the shout: "Watch it, you're going to hit."

* * *

[32] Q. In order to explain your particular situation at the time when this shouting went on, have you had occasion to doze off or sleep and be suddenly awakened? A. Oh, yeah.

Q. Was it that sort of thing that happened when you heard this shouting? A. I couldn't be sure.

Q. Incidentally, you were paid by parties for this trip, were you not? A. Yes.

Q. Do you have a recollection at this time of being tired and sleepy as you approached this intersection? A. I was tired and sleepy ever since I left the hospital.

Q. You live on "R" Street, do you not? A. Yes.

Q. After this shouting, and what not, was going on, [33] and you came to, did you have an opportunity to see this car, at all? A. When I saw it, I applied my brakes and went right into it.

Q. Was there anything unusual that you noticed about the Coviello car at that particular time of the accident? A. No; it happened so fast.

Q. Do you know whether or not he had his lights on? A. I couldn't be sure because, see, when I hit, I was right behind the front door — right back fender.

* * *

[37] Q. You said you were tried and sleepy all the way from the hospital to where this accident happened; did you have any occasion to see the blinking red light that was at the corner there? A. Oh, yeah.

Q. And it was just after you had started off, or slowed down, or paused, when you said you did, that that was the point when you

dozed off and then heard the shouting?

* * *

Q. Is that about the time you dozed off? A. When I heard the shout, that's when I saw the car.

Q. When you heard the shouting is when you woke up? A. Was when I saw the car.

Q. Well, at the time that you heard the shouting, were you dozing at that time? A. I mean, I don't — (stopped)

Q. Let me rephrase it: You said that you had come out of a dozing by shouting; that had sort of brought you to your senses, or something of that sort, is that right? A. I didn't see nothing coming up 15th when I got to the intersection.

* * *

[38] Q. Do you have a recollection, yourself, as to whether or not you did or did not apply your brakes? A. Did what?

Q. Do you have any recollection of whether you did or did not apply brakes? A. Sure, I applied brakes.

Q. You are sure you did? A. (Nodded in the affirmative)

* * *

[39] CROSS EXAMINATION

BY MR. SMITH:

Q. Mr. Gaddy, at 15th and "R" Street you testified that you possibly had dozed off; what do you mean by dozing off?

* * *

THE WITNESS: Possibly mean yawn.

THE REPORTER: Mr. Witness, I cannot hear you. Repeat what you said?

THE WITNESS: Close your eyes and yawn, I call that dozing.

BY MR. SMITH:

Q. Were you at any time unconscious? A. No.

Q. Were you asleep? [40] A. No.

Q. Do you recall having a conversation in a police car with the police officer after the accident? A. Yes.

Q. Did he discuss with you, at all, about the dozing off? A. I don't recall it.

Q. You don't recall the subject being mentioned? A. No.

Q. The police report says that your condition was normal; that you were not sleeping; that presumption would be that that was what you said in the car? A. More than likely it was.

Q. Were you dozing at the time you reached the light? A. No, I'm sure I come to almost a complete stop.

Q. And did you look in both directions? A. I looked to the left.

Q. And it is a one-way street? A. Right.

Q. And did you see any other automobile? A. No, I didn't after I entered the intersection.

* * *

[44] (OUT OF THE PRESENCE OF JURY)

MR. O'CONNOR: On Number Four, an objection is entered to the entirety. There is absolutely not one scintilla of evidence of contributory negligence or negligence in any degree on the part of the plaintiff Terhune as a passenger in this vehicle.

THE COURT: Let us hear you on that.

MR. HOLFORD: We think that we have introduced sufficient evidence to show that Mrs. Terhune was the party who drove into the parking lot. We have evidence in here, whether the jury believes it or not.

We have Mr. Gaddy, who certainly established that she is the one who said she was tired and sleepy and she asked him to take over the wheel. We have testimony by him to the effect that he was

sleepy and tired; that he sat over there and exhibited, by his own actions, his cat napping, or whatever it was; his driving back; he was sleepy and drowsey all the way. She was sitting right next to him.

Let us put it analogous to a person who has been drinking. If I permit a person to operate a car of which I have possession, apparent authority — at this time there is no testimony that he knew whose car it belonged to. She was driving. She had the authority. She was the one who turned it over to him.

[45] THE COURT: I believe he said Mrs. Wells made the arrangement; that he talked with her.

MR. HOLFORD: Mrs. Wells told him after he had taken over that he would be paid for it.

But I still feel that there is ample evidence to show that the plaintiff in this case, even as a passenger, has a duty if she knows his condition exists and she does not exercise her right to say: Moveover, now; we are on "R" Street, you are tired and sleepy; we are going straight down "R" Street; let somebody drive.

There was no need for directions then. This was back where D.C. General Hospital is. These people know the area. They know that once you hit Florida Avenue it is almost a straight shot to where they were going.

She permitted the boy to drive. She contributed to the accident.

That is evidence and more than a scinitilla of evidence. You have direct evidence from the party, himself.

THE COURT: The Court does not feel that there has been sufficient evidence of contributory negligence on the part of the passenger to warrant this particular instruction.

MR. HOLFORD: Couldn't we have an instruction on imputation of negligence as an agent of a principal?

[46] THE COURT: Yes, I think we plan on giving that one.

MR. O'CONNOR: I have no objection to the remaining instructions. But I want the Court to recognize that this agency-principal relationship puts Mrs. Terhune in practically the same position as the defendant Gaddy. She was requested to accompany the principals, to assist in the driving in Washington.

THE COURT: I quite agree, Mr. O'Connor. I just think that it is a jury question with the proper instructions as to what to look for.

The Court had in mind giving passenger imputation of driver's negligence, together with an explanation of joint ventures.

* * *

September 12, 1968

* * *

[3] (OUT OF PRESENCE OF JURY)

THE COURT: The Court has decided on the two instructions that she took under advisement and has decided against giving either one on the facts in the case. So the assumption of risk or contributory negligence instructions will not be given.

MR. HOLFORD: All right.

At this time, then, in keeping with the instructions, I would like for the record to show that I asked for the following instructions: 70 and 71, having to do with employment.

And in addition to that, if you find that the defendant Gaddy was under the employment of the plaintiff, either solely or with others, to operate the vehicle of Kenton Terhune, owner, and at the time and place of the accident, Defendant Gaddy was acting within the scope of such employment, then any negligence on the part of the defendant Gaddy is to be imputed to the plaintiff Ruth Terhune under such employment. And if such negligence is a proximate or contributing cause, then your verdict must be for the defendant.

I offer that instruction in view of the Court's decision on the other two.

THE COURT: Do I understand that it says that in the event that he was employed by someone else, that his negligence [4] is going to be imputed to the plaintiff?

MR. HOLFORD: No, Your Honor, you do not. I say, if they find this his employment is under the plaintiff Ruth Terhune; in other words, if she is the party under the facts, a party who employed him to do the driving over and back for compensation, then, under those circumstances, if he was acting within the scope of that employment, then, in that event, the negligence on the part of Gaddy would be imputed to —

THE COURT: Mr. Holford, what evidence is in the case that he was employed by Ruth Terhune?

MR. HOLFORD: In the first place, he testified — and I am trying to recollect from my own recollection of the facts, which I think are correct in my own mind — that he got into the car; Ruth Terhune drove the car as far as Indiana Avenue, or thereabouts, and that at the time that he got out, she said she was tired and asked him if he would drive. And then, under his testimony, he stated that he would drive. And then at that time he said he would drive if he were paid; if he received compensation for it.

At that time it was agreed by the parties, who were in the car — and I admit that at the time there was no one who said it, and I also understand and will agree with the Court that after the final bell, after everybody was going home, that [5] Mrs. Wells was the one that conveyed the money to him. But I think there are sufficient facts to show that Ruth Terhune — and I point to her as being the one who asked him to drive — that she was the employer and had the apparent authority. And if there was another principal, that

principal was undisclosed to this party at the time.

At the time he was operating this vehicle, he had every reason to believe that he was operating this vehicle under Ruth Terhune.

Now, I do have a case which is a little stronger than ours, of course, which is Baber (phonetic), et al, vs. Aker Motor Lines, Inc. in 251 Fed. Sec. 843, cited November 2, 1954. The case number in the U.S. Court of Appeals, District of Columbia, Circuit Number 1184. It is cited in 94 U.S. Appeals D.C. 221.

* * *

[6] THE COURT: My recollection is that he said that that arrangement was made before he got in the car. I do not believe that there was ever any allegation that it was said at the time that he started to drive, not even by him.

MR. HOLFORD: I would have to go back over his testimony. But I believe that his testimony will reveal that.

But, even so, it was made at the time.

[7] THE COURT: Well, the Court will rule that this should not be submitted to the jury; that there is insufficient evidence in this case for them to take that into consideration.

MR. HOLFORD: With all respect to the Court —

THE COURT: You may have your exceptions.

MR. HOLFORD: Now, Your Honor, at the close of every case, we, of course, make a motion. At this time I would like to renew my motion for directed verdict against the plaintiff.

* * *

Volume Three

September 10, 1968

[3] LEONA RUTH TERHUNE

was called as a witness by the Plaintiff and, first having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. O'CONNOR:

Q. Mrs. Terhune, *** Will you state your full name, please?

A. Leona Ruth Terhune.

Q. And where do you live? A. The township of Salamanca. My address is Little Valley, Route One.

Q. That is Little Valley, New York? A. Yes.

Q. Now, are you married? A. Yes.

Q. What is the name of your husband? A. Leo.

Q. Does he have a middle initial? A. Leo D.

Q. Are you living with your husband? A. Yes.

Q. Do you have children? A. Yes, I've got three.

[4] Q. What are their names and ages? A. Carol was 21; Robert is — no, Robert is 17; Rollins is 13.

Q. Do they live at home with you? A. Yes, they do.

Q. Now, would you describe to the jury your home and where you live with reference to Salamanca? A. It's in West Salamanca, five miles out in the country.

Q. Do you have grounds or acreage surrounding it? A. Yes; we own 22 acres at that place, and a mile away we own 43 acres.

Q. Do you farm that land? A. Yes.

Q. Now, directing your attention to the day of May 29, 1963, did you make a trip to Washington, D.C. on that day? A. Yes.

Q. Will you tell the jury the circumstances which led up to your coming to Washington? A. My sister-in-law, Alice, called and wanted me to —

Q. Keep your voice up. A. She wanted me to help her to drive. She said it was too tiring; that she was the only one who could drive.

Q. Why was she coming to Washington? A. To get her uncle, who was in the hospital.

[5] Q. Was anyone else coming with her? A. Her mother, Mrs. Wells, and her son, Allen, came.

Q. That is Allen Terhune? A. Yes.

Q. In other words, Mrs. Wells and Mrs. Alice Terhune and Allen, they were all of one family, and you are of another family? A. Yes.

Q. Did anybody from your family come with you? A. No, they didn't.

Q. And did you say you were going to help her with the driving? A. Yes.

Q. What were your plans as far as coming to Washington was concerned? Were you going to stay and spend some time in Washington? A. No, we were coming right down and right back.

Q. You were going to pick the uncle up and go right back? A. Yes.

Q. How long have you been driving an automobile? A. Ever since I was 18.

Q. How old are you now? A. Forty-four.

Q. Now, approximately what time did you leave Salamanca for Washington? [6] A. I believe it was around ten o'clock.

Q. In the morning? A. Yes.

Q. And did you come directly to Washington? A. Yes.

Q. What time did you arrive in Washington? A. Around 10:00 at night.

Q. It was dark? A. It was dark, yes.

Q. Had you ever been to Washington before? A. No.

Q. Who was driving the car at the time that your group entered the City of Washington? A. I did.

Q. Did you know where the hospital was located that you were going to? A. No, we didn't exactly.

Q. Did you know the name of the hospital you were going to? A. I didn't, but my sister-in-law did.

Q. Do you know the name of the hospital now? A. I couldn't —

Q. You do not recall it? A. No, I don't recall it.

Q. What efforts did you make to find the hospital after [7] you entered the District of Columbia? A. Pardon?

Q. What efforts did you make to find the hospital? A. Well, we drove around and finally stopped to find out how to get there.

Q. How long did you drive around before you stopped? A. An hour, probably, somewhere near that.

Q. Around the City of Washington? A. Yes.

Q. And you were unable to locate the hospital yourself? A. Yes.

Q. Where did you stop, do you know? A. We stopped at a parking lot where they park cars. We seen some people there, so we stopped there.

Q. Do you have any idea where the parking lot was, or is now? A. I couldn't ever go to it; I wouldn't know it.

Q. And were you driving at that time? A. Yes.

Q. Did you make inquiry as to where the hospital was? Or did somebody else make inquiry? A. Miss Wells, she went up and she asked where abouts the hospital was.

Q. In other words, you parked her car and she got out of the car? [8] A. We all got out and walked over through the place.

Q. Now, you say there was a group of people there at that time? A. Well, the ones that was taking care of the parking lot, and that was all.

Q. Who engaged them in conversation? A. Miss Wells.

Q. Did you do any of the talking? A. No.

Q. Did you hear what was said at that time? A. At that time

probably I did. But I couldn't recall right now; it's been so long.

Q. Well, what was the result of the conversation that Mrs. Wells had with the group? A. She was wanting the directions and they were trying to tell directions. And they couldn't get it exactly because it was so far away, that they asked if one of them could go with us. And this one guy, he — well, they talked about it and which one could get away. And that one could, so he took and went with us. But I don't know what his name is right now.

Q. Did you subsequently determine that his name was Gaddy? A. Yeah, Gaddy.

Q. They call him "Bill," do you recall? [9] A. No; that's the only one I heard — was Gaddy.

Q. After arrangements were made for him to go with you, did you continue to drive the car? A. I was going to drive and Miss Wells said: Let him drive; he knows the city better than I did.

Q. Did he take the wheel of the car at that time? A. Yes.

Q. That was while you were still near the parking lot, when you went back to get in the car? A. Yes. I got under the wheel and Miss Wells was next to me, and he was going to get in on the right-hand side. And I slid over and he got in on the other side. He went around.

Q. You say you got in on the right-hand side? A. The left side, under the wheel, intending to drive. But they decided to have Gaddy to drive because he knows the city more.

Q. So, then you moved over to the right-hand seat? A. I moved to the middle.

Q. Did you say to the middle? A. I just slid over. Miss Wells slid over, I slid over, and the driver was there.

Q. So when you were going to the hospital there were three of you in the front seat? A. Yes.

[10] Q. And that was who? A. Mr. Gaddy was driving; I was in the middle; and Miss Wells was on my right.

Q. I see. And in the back seat, then, would be who? A. My sister-in-law and her son, Allen, and her uncle.

Q. Well, now, I am talking about on the way over to the hospital? A. Oh! It was just, I believe, just Miss Wells and me.

Q. In the front seat? A. Yes.

Q. With Gaddy? A. Yes.

Q. And you subsequently arrived at the hospital, is that correct? A. Yes.

Q. Now, did you go in the hospital? A. No; they said to sit out in the car and wait for them.

Q. Who sat out in the car and waited with you? A. Nobody.

Q. Did Mr. Gaddy go in the hospital? A. No, he didn't.

Q. Did he stay in the car? A. He sat at the car.

Q. Did Allen go in the hospital? A. I believe he did, because it was his relations; wasn't mine.

[11] Q. Did Mrs. Wells go in the hospital? A. Yes.

Q. Did Alice Terhune go in the hospital? A. Yes.

Q. So those three went in and you stayed in the car with Mr. Gaddy, is that right? A. Yes.

Q. How long were you at the hospital before they came out with the uncle? A. It was quite some time; probably an hour or an hour and a half; might be longer; it's been so long ago.

Q. While you were waiting, did you have anything to eat, or the like? A. No.

Q. Did Mr. Gaddy have anything to eat or to drink? A. No.

Q. After the parties came out from the hospital with the uncle, how did you arrange yourselves in the car then? A. Well, I was in the front and I remained there; beside me was that Miss Wells; Gad-

dy was the driver. He was in the front seat. In the back seat, I don't know exactly how they were sitting. But they was the uncle and Allen Terhune and Alice Terhune was in the back seat.

[12] Q. So, Allen, the uncle and Alice were in the rear? A. Yes, they were in the back.

Q. Now, after the uncle was in the car and you all were proceeding to leave the hospital, what discussions were had as to Gaddy and where he would take you or where you would take him? A. He was going to take us back where we picked him up and tell us the route to get back on our way to get back to Salamanca.

Q. And you still did not know where that parking lot was, but he was going to drive back there? A. Yes.

Q. Now, do you know what streets you traveled while you were in the District of Columbia? A. No, I didn't; it was dark at night and I didn't pay no attention. I was watching traffic.

Q. After you left the hospital, what was the weather condition? A. It was misty kind of, a dark, wet night.

Q. It was not raining, though? A. No; it was just sort of misty.

Q. How was visibility? A. Poor.

* * *

[13] Q. Did there come a time — well, are you familiar with the intersection of 15th Street and "R" Street at this time? A. Yes.

Q. Did something happen at that intersection to the car that you were in on the night of May 29 or early morning of May 30? A. Yes.

Q. What happened at that intersection? A. Well, we came up, stopped for the red light, and started up. And all of a sudden there was a car —

Q. Before you go any further, that is what I meant: there was a time when you were on some street, that you later identified as "R" Street, and you saw a blinking, red light, did you not? A. Yes.

Q. All right. Now, what did the driver Gaddy do as he approached that blinking red light? A. He stopped and started to go ahead.

Q. All right, and did you observe anything at the time he started to go ahead? A. Did I observe anything?

Q. Did you see anything? A. I didn't at that time, no.

[14] Q. All right, and did there come a time after he started up to enter 15th Street that you did observe something? A. Yes; after we got part way across this other car came.

Q. And from which direction, to your right or left, was this car coming? A. Coming from the left.

Q. And did you notice anything unusual about that car? A. It came without any lights.

Q. Were you able to see how many people were in that car? A. Yes, there was two.

Q. Two people in the car? A. Yes.

Q. And the car had no lights on it? A. Yes.

Q. Did you hear anyone in the car say anything to Mr. Gaddy? Or did you say anything? A. Yes; they said, "There's a car coming" — well, it was a car, anyway. The exact words, I don't know the exact words.

Q. What tone of voice did you use when you told him that? A. Screeched out.

Q. Now, how far from your vehicle to the left was this oncoming car, that you saw, when you first saw it? A. I don't think it was much more than a car-length [15] from the front of ours.

Q. To the left of you? A. Yes, when I seen that car.

Q. What happened immediately after that? A. We hit his rear part of the car.

Q. What part of your car was in collision with that car? A. The whole front.

Q. What part of the oncoming car was struck by your car? A. Pardon?

Q. What part of the car was struck? The front, middle, or rear? A. Of the other —

Q. Yes? A. On the back, right end.

Q. Right rear? A. Yes.

Q. Now, at the moment of impact, I think you have testified that Mr. Gaddy was driving, you were sitting in the middle of the front seat, and Mrs. Wells was on your right? A. Yes.

Q. Now, what was your position just prior to the impact? How were you seated? A. Well, there was three of us in the front seat. And I usually try to let the driver have enough room, so [16] I had my arm behind the driver in the strap that's on the wall of the car.

Q. Were you in that position at the time of impact? A. Yes.

Q. All right, what happened at the time of impact, to the best of your recollection? A. Well, I must have throwed my hand to catch myself because my middle finger, here, was — there was quite a bump on it and it was all swelled up. Well, then I must have got up against the wheel somewhat, because I didn't realize I was black and blue until I got home, because I didn't have no place to change my clothes. (indicating)

Q. Were you thrown about in the car, at all? A. I must have been throwed up against the wheel and the dash because the ones behind pushed us. (indicating) We all went right up front-like — pushed the whole thing. We went up against there.

Q. What parts of your body were struck, do you recall? A. Yes; this side of my breast (indicating) was all black and blue; and my rib was partly fractured, or something; it wasn't broke but it was quite sore; and the pit of my stomach —

* * *

[17] Q. Now, immediately following the accident, what did the occupants of your car do? A. We got out of the car. I believe the driver pulled ahead from the accident. He pulled up ahead a little ways.

Q. Out of the intersection? A. Yes, and didn't stall the motor. He pulled it ahead, out of there a little ways. Then we all got out. Then the policeman come along.

Q. Was it raining when you got out? A. No, a mist.

Q. Still misty? A. Yes.

Q. Were the streets wet? A.. Yes.

Q. And after you got out of the car, did you again [18] observe the Coviello car, the car you hit, and its condition? A. Yes; the car, it had swung around and went back and hit two other parked cars.

Q. Were you able to observe whether the headlights were on that car at that time? A. The headlights was off. And, also, they was a woman in the car that got out at that time. I seen her get out. But where she went, I don't know.

Q. Do you know that woman's name? A. No, I don't. She disappeared.

Q. While you were standing on the street corner, how long did you have to wait before the police arrived? A. A very short time.

Q. After the police arrived, what happened? A. Gaddy got in with them and they was talking. And the one we hit, I believe was in

— I don't know if they were in both the same time — but back and forth in the car.

Q. How long a time are we talking about? 15 minutes? 10 minutes? 5 minutes? A. Oh, they were quite sometime; probably an hour maybe, or 3/4 of a hour we were there.

Q. And you people were all standing on the corner at that time? A. [19] Yes.

Q. Did anything happen at that time, while you were standing on the corner? A. Yes; that Miss Wells — she's an old age person — she fainted.

Q. How old is Mrs. Wells, could you approximate? A. I couldn't. She must be up in the seventies.

Q. Well, she was an elderly woman? A. Yes.

* * *

[20] Q. How did you get back to Salamanca? A. Well, we — from the hospital we hired a cab to go to the bus terminal; from the bus terminal we waited there until we got — we wired Salamanca to get some money. We didn't have enough for all of us. We had enough for three of them. We finally sent the three on; that was the uncle and Allen Terhune and Miss Wells we sent back. Alice and I stayed until the wire — they wired the money back. That was on the 30th.

Q. So the three of them were able to get out of Washington in the early morning of May 30? A. Well, we didn't send them for awhile. And finally the oldish woman and the uncle was getting so unrestless that we sent them on with the boy.

Q. With the boy, Allen? A. Yes.

Q. Then you and Alice stayed in Washington? A. Yes.

Q. Where did you stay? A. We stayed partly at the bus terminal and partly over [21] to the Western Union to get our money to go back home.

Q. Was that a Greyhound or Trailway's Terminal, do you remember? A. I believe it was Greyhound.

Q. Now, how long was it before you and Alice left Washington? A. I believe it was a couple or three hours later.

Q. Well, this is May 30 that we are talking about? A. Yeah, it was on a holiday.

Q. Well, that is Memorial Day, is it not? A. Yes; it was hard for them to get the money any place in Salamanca; there was no place open.

Q. When did you leave Washington? Could you tell us the approximate time of day, or morning, noon, or afternoon? A. It was towards evening.

Q. So you had been at the bus terminal since very early in the morning until the early evening; is that correct? A. Yes.

Q. Did you take a hotel room or anything, so that you could rest? A. No, we did not; we couldn't.

* * *

[31] Q. Mrs. Terhune, you have testified, I believe, that you are 44 years of age; is that correct? A. Pardon?

Q. You are 44 years of age? A. Yes.

Q. Can you tell us the date of your birth? A. June 13, 1924.

* * *

[41] CROSS EXAMINATION

BY MR. HOLFORD:

* * *

[43] Q. And the accident in this case did not happen on May 29; you had arrived May 29, but it actually happened after midnight on May 30, is that right? A. Yes.

Q. So the day the accident happened, you were out the following day? A. Yes.

Q. And you did, in fact, drive around Washington, D.C. for one hour seeking the D.C. General Hospital, a Government Institution, here in Washington, D.C., and the first place that you stopped was a parking lot after driving for a full hour around this city, is that correct? A. Yes.

Q. And you left at ten o'clock that morning of May 29, right? A. Yes.

* * *

[45] Q. Did you drive the whole distance from Salamanca to Washington, D.C. A. No.

Q. Where did you change? A. I couldn't tell you now. We changed back and forth.

Q. Now, Mr. Gaddy here, do you recognize him today? (indicating) A. Yes.

Q. And at the time that you spoke to Mr. Gaddy, is it not true that Mr. Gaddy was visiting his brother, who at that time was at a parking lot and was on duty? A. I believe it was his brother; it was somebody, yes.

* * *

[46] Q. When you met Mr. Gaddy, did you ask Mr. Gaddy whether he was a driver properly licensed in the District of Columbia? A. They didn't ask; but one of his buddies that was with him told him he could drive.

Q. But you had not seen him before? A. I never seen him before, no.

Q. You had never seen him drive before? A. No.

MR. O'CONNOR: I will object to this because [47] there is no issue before the Court as to whether he was a licensed driver; that is not a matter to be concerned with here.

MR. HOLFORD: There is a pleading, Your Honor, I believe, as to contributory negligence. I am getting to it in the best way that I know how to, to inform the Court of circumstances as they existed that night. I think that it is pertinent and I will try to tie it up.

THE COURT: Overruled.

BY MR. HOLFORD:

Q. Did you ask Mr. Gaddy where he worked? A. I didn't ask him nothing because it wasn't my car. My sister-in-law's mother was asking the questions.

Q. But you were there? A. I was there, yes.

Q. Did you know that Mr. Gaddy had worked all that day?

MR. O'CONNOR: I object to this line of questioning, Your Honor.

THE WITNESS: No, I did not know that.

MR. O'CONNOR: The witness has testified that she did not engage in the conversation that Mrs. Wells and the sister-in-law had.

(Mr. Holford requested a bench conference. This cause then resumed in open court.)

BY MR. HOLFORD:

[48] Q. Mrs. Terhune, you were present — A. Yes.

MR. O'CONNOR: Wait until he finishes the question.

BY MR. HOLFORD:

Q. Wait until I finish the question because these are questions which will involve further questions, which I might not ask until I know you have personal knowledge. So, in all fairness to yourself and everybody else — A. I can't hardly hear you.

Q. I am sorry. I will try to speak louder.

Mrs. Terhune, you were present when the conversation went on between Mr. Gaddy and whomever he was talking to about showing

you where D.C. General Hospital was; is that correct or incorrect? A. Yes.

Q. Did you at any time hear anyone ask or inquire of Mr. Gaddy whether or not he had worked that particular day? A. No.

Q. Did you hear anyone ask him about his condition, as to whether or not he had been exhausted and tired? A. I didn't.

Q. Were you under the wheel of the car when Mr. Gaddy [49] took control and did you slide over? A. That Miss Wells —

Q. I did not ask you who told you; I just asked you was that the condition as you were there.

Did you slide over and let Mr. Gaddy operate that car? A. Yes.

* * *

[52] Q. Now, as you were driving back from the hospital and you had picked your uncle up and were coming down "R" Street — no matter what direction you went or what street you were on; that is immaterial as far as that is concerned — but as you were coming down "R" Street and approaching 15th Street — let us say back at 14th Street and 15th, did you have occasion to observe Mr. Gaddy as he approached that car, whether he had his eyes open, whether he was dozing, or whether he was doing anything? [53] A. I wasn't watching him. I was watching through on the highway.

Q. So you did not look at the driver, at all, and you have no idea? A. No. I was sitting right by him; I wasn't going to stare at him.

* * *

[54] Q. Now, were you or were you not watching the sights? A. There wasn't no sights to see at dark. You can't see sights at night when it's so dark and gloomy. And I have always drove and I was watching the highway.

* * *

[77] CROSS EXAMINATION

BY MR. SMITH:

* * *

Q. You met a Mr. Gaddy about what time? A. Around 11 o'clock that night — 11:30.

Q. Could you estimate about how many hours of the daytime that you spent driving, you know, from 10 o'clock until whatever time it was that you met Mr. Gaddy? A. About half the time, I imagine.

Q. The two of you driving? [78] A. Yes. She would drive; then I drove; then we went back and forth.

* * *

[81] Q. How long were you over at the hospital waiting for Mr. Terhune, or whoever it was you were picking up over there? A. About an hour and a half to two hours.

Q. What did you do during this time? A. Sat in the car with the driver.

Q. Did you converse much? A. We talked back and forth a little.

Q. Did he appear tired? A. What was that?

Q. Did he appear tired? Did he appear to be tired? A. No, no, he didn't really.

Q. Did he realize how long you were going to be over there? A. He didn't know. He knew that we had to go and pick up somebody I believe.

Q. Did he ever indicate that he wanted to go back ahead of time? A. I can't recall.

* * *

[82] REDIRECT EXAMINATION

BY MR. O'CONNOR:

Q. Mrs. Terhune, there have been some words used that you did not understand fully during the cross-examination, is that correct? A. Yes.

Q. Would you tell the court and the jury the extent of your education? [83] A. I only got to the sixth grade, but I was doing third grade work.

Q. Can you read and write? A. I can write, yes, some. I can sit down and read a newspaper for myself and understand it, but not direct to anybody.

* * *

[85] MR. O'CONNOR: What number is that?

THE COURT: 91 is the passenger imputation, driver's negligence, together with 74.

MR. O'CONNOR: May I review those this evening and comment tomorrow morning?

THE COURT: Yes, surely.

[86] Since 91 refers to joint venturers, the Court felt it was necessary to give 74 as an explanation of what is a joint venturer.

* * *

THE COURT: Do you have, Mr. O'Connor, the list of numbers that Mr. Holford had given the Court as to the requested instructions 21, 22, 23, 24 and so on?

MR. HOLFORD: Your Honor, I left the office this morning with some sort of emergency signal up in the air. They should be typed. She was in the process of doing it, but I called her and told her to stop. She stopped at this number. I have other numbers that I want to refer the Court to.

THE COURT: Is this the list that contains those numbers?

MR. HOLFORD: Yes, Your Honor. But the first part of them, I think, are already typed. And the circled #44 is the one that has

already been given.

THE COURT: I believe that there was which one marked 92, with modifications. That was the passenger contributory negligence, as such, which the Court decided against.

[87] MR. HOLFORD: Yes, Your Honor.

THE COURT: 91, you asked for, which is the one the Court plans to give, together with the additional explanation not requested.

* * *

[92] THE COURT: I understand, Mr. O'Connor, that you will look at those, too?

MR. O'CONNOR: Yes.

THE COURT: Would you like to see them now? We have them right here if you like.

MR. O'CONNOR: If they are standard, I cannot have objection.

THE COURT: They are.

May I try this on you and see how it is, because we have tried to combine the two and it may not be too clear. This is passenger imputation and driver's negligence:

"If you find that the driver of the vehicle, in which the plaintiff was a passenger, negligently and proximately contributed to the causing of this accident, and if you further find that the plaintiff and the driver were joint venturers, which term I will now define, then the driver's negligence must be imputated to the plaintiff — passenger may not recover. Where two or more persons are engaged in an activity in which they are acting in pursuit of a common purpose and in which they have a mutual interest and a joint right of control, they are engaged in what [93] is known as a joint venture or enterprise. When a joint venture or enterprise exists, each member is deemed to be acting for all other members, with the result that the negligence of one member of a joint venture or enter-

prise is imputated to all of the other members. The jury should note that a joint venture relationship is one which necessarily arise from some agreement between the parties, either expressed or reasonably implied, by virtue of which they undertake to share equally the responsibility for and the right to the management of the enterprise. This relationship is not one that can spring up intentionally, nor is it one that can be arbitrarily imposed. It is essential that parties to a joint venture be in pursuit of a common object and act for common purpose. If you find, however, that the plaintiff and the driver of the car in which she was riding were not joint venturers, then the plaintiff is not legally responsible for her driver's conduct. And if she, herself, is free from contributory negligence, any valid claim for relief which she might have is not barred by the negligence, if any, of the driver."

MR. O'CONNOR: I would have serious reservations about granting an instruction such as that, Your Honor. To begin with, it presupposes that Gaddy and the plaintiff Terhune were seeking a mutual benefit [94] from some undertaking which they had jointly engaged in. There is no mutuality of interest between the plaintiff Terhune and the defendant Gaddy. Both of them are there by somewhat happenstance, and in the category of volunteers. Mrs. Terhune was not under any obligation and had no interest to come to Washington except to assist her sister-in-law in driving over an extended period of time, a substantial mileage. Mrs. Terhune was not a party to the retaining of the services of Gaddy. She was driving the car at the time, when the arrangement was made by Mrs. Wells and Mrs. Alice Terhune.

I do not see where, by any stretch of the imagination, that there could be mutuality of interest between Gaddy and the plaintiff. True, they were both occupants of the same car. But neither were under

the control of the other. They were not pursuing the same objective or engaging in the same enterprise.

I am afraid that this jury could very easily interpret that instruction as saying that this was a joint enterprise of the Terhune family. It was insofar as the Alice Terhune side of the family. But Ruth Terhune was nothing but a mere volunteer to participate in this venture at the request. She was receiving no benefit from it whatsoever.

THE COURT: The Court must say that as far as [95] experience had by the Court before becoming a member of the bench, it would not be a joint enterprise insofar as experience.

MR. O'CONNOR: Those are usually carpools and things of that type.

THE COURT: Where they all save money and contribute and so on.

What is your feeling about it, Mr. Holford?

MR. HOLFORD: My feeling is this: She is the one who was the director. She drove in. She is the one who was seeking. She was driving around for an hour looking for a place. She was —

THE COURT: She said, I believe, that they had each shared in the driving fifty percent. She was the one who stopped, since she was at the wheel at the time.

I believe that she also said that Mrs. Wells, whose brother this was that they were coming to get, had made the arrangements. That is how I understood her testimony, and it is unrefuted, I believe, and that she had talked with people and had gotten out and so on. I do not really believe that this is the sort of case that is generally contemplated in a joint venture.

* * *

[97] THE COURT: I do not think that that is a material part of it. I think that the material fact is what was the actual effect of this ride to the hospital. I do not really think the measure of whether this woman had been voluntarily driving an automobile of somebody else is important. I do not think that the fact that this man had come along with them made this a joint venture with her for her specific benefit.

MR. HOLFORD: I would say that if there was not payment involved —

THE COURT: There was no payment to her. What is her benefit?

MR. HOLFORD: She said that she had been driving around for an hour and she got lost and wanted help. And she got help. And she got help, whether you call it financial or other assistance, monetary —

THE COURT: The more you talk, the less I am convinced.

* * *

[98] THE COURT: The owner of the car was sitting where?

MR. SMITH: In the back seat.

THE COURT: But I do not think that is imputed on this plaintiff.

So the Court will rule that there is not a joint venture relationship to be considered. So we will not give it.

MR. SMITH: Your Honor, I would like to point out, or make request for #59, assumption of risk. I do think in this case there has been some evidence that these people were aware that Mr. Gaddy testified that he napped out there for awhile and he did yawn and show signs of drowsiness on the drive back; that these people were in this automobile with him.

And there should be an instruction on assumption of risk there.

MR. O'CONNOR: There is no evidence of any knowledge on the part of the plaintiff that they were aware. In fact, to the contrary, they didn't see him napping.

[99] All you have is self-serving declarations. He did not know whether he napped or not. He said he might have, he thought he napped.

MR. HOLFORD: It is not self-serving. It is a question I brought out.

MR. O'CONNOR: He did not call it dozing. He said yawning or stretching, or something.

I do not see that there is any assumption of risk issue involved in this case at all.

MR. HOLFORD: I might ask one question, if I may:

If it is not joint venture or assumption of risk, there is —

THE COURT: Let's take a look at assumption of risk.

MR. HOLFORD: 59, Your Honor.

(Thereupon, the Court read Instruction Number 59)

THE COURT: Well, I have a feeling that if this were a situation where this man had never learned to drive an automobile, and was not licensed, and as it turned out, did not know how to drive, we would have a much closer situation.

MR. HOLFORD: I know that it is a tight question. But there must be some application where members of the public can reasonably rely upon the fact [100] that they are protected from somebody who just has a car, whether borrowed or not, or otherwise, and come down and turn it over to somebody who, as this fellow put it — you saw his testimony on the stand, and the man said he was just beat.

Now, for a person to turn their car over to someone to drive on the streets of Washington, D.C. like that, there must be one of these that fits the category.

If it is not joint venture, it has to be assumption of risk, or an act of negligence in turning the car over to this gentleman and permitting him to drive after she saw what happened at the hospital, that he was sleepy and tired and yawning —

THE COURT: My guess is that she was probably so tired and sleepy that she was not paying too much attention after the day that they described.

MR. HOLFORD: There must be one that fits it.

THE COURT: Well, the Court will give assumption of risk.

MR. O'CONNOR: I will object to it, Your Honor, very definitely.

THE COURT: The Court will decide whatever danger or hazard — I do not really know what danger or hazard there is in the case.

[101] I will think about it overnight.

MR. HOLFORD: Might I suggest one parallel: One of the first dangers of a person driving under intoxication is failure to be able to react —

MR. O'CONNOR: That is no issues here.

MR. HOLFORD: I am saying parallel.

It has to have two. You never have a parallel with one.

A parallel is two: That is, a person who drives when drinking has the same effect and cannot have proper reaction under those circumstances.

That is what I call a parallel.

THE COURT: I will let you know in the morning.

* * *

[103] MR. HOLFORD: Are we permitted to argue to the jury the question of negligence as far as Ruth Terhune is concerned, in

just picking up anybody on the streets to drive her car?

[104] That was part of the evidence. And I assume that we are, even though there has not been an instruction. I assume that we will be able to argue the facts of the case.

THE COURT: Yes, that will be allowed.

MR. SMITH: I would like to say at this time that at the time Mr. Holford made his objection on the instructions that were left out, I was looking for an opportunity to join him. And I would like to have that in the record.

THE COURT: Very well.

MR. SMITH: Assumption of risk and joint venture and the last one he read.

THE COURT: All right.

[105] CHARGE OF THE COURT

THE COURT: Ladies and gentlemen of the jury, as you know, this Court consists of a Judge and a Jury, each of us having a separate function and responsibility.

It is my duty to preside at the trial, to pass upon questions of law as they arise, and finally, at this stage of the proceeding, to explain to you the law applicable to the case.

You are instructed that you are bound and obligated to follow these instructions as to the law. You are the sole judges of the facts. You are to decide for yourselves what the facts are.

In making this determination you must look to the evidence in the case, which consists of the testimony that you have heard from the witnesses who took the stand, and also the exhibits in the case, the stipulations between counsel, which were stated to you in open court, and also you may consider as evidence those inferences which, to your mind, logically and reasonably arise from the evidence in the case.

After you have decided for yourselves what the facts are in the case, you apply to those facts the law, as I shall state it to you, and then you deliberate and reach a verdict.

You are not only the judges of the facts in this case, [106] but you are the judges of the credibility of the witnesses who appeared herebefore you; that means that you are to decide the credit and weight you would give to the testimony of the witnesses. You may decide what witnesses to believe and the extent to which you believe them.

In passing upon the credibility of a witness you may consider the demeanor of a witness on the witness stand; whether the witness impressed you as a truth-telling individual, or the contrary; whether the witness impressed you as having an accurate memory and recollection.

You may consider the interest, if any, of a witness in the outcome of the case and decide whether or not that interest colored the testimony in any way.

You may consider the probability or improbability of the testimony of the witnesses; its reasonableness or unreasonableness in deciding what weight you will give to it.

You may consider any bias or prejudice which you think may have been manifested by any witness, and you may consider the friendship of a witness towards a party to this case, or any ~~blood~~ relationship, and decide whether any such associations affected in any way the desire or capability of that witness to give accurate testimony.

[107] Finally, you may consider all those human factors shown by the evidence which may affect the desire or capability of a witness to give accurate testimony.

In judging the credibility of a witness, you shall have in mind the law that a witness is presumed to speak the truth. This presumption is not conclusive, however, and it may be overcome by contradictory evidence, by the manner in which the witness testifies, by the character of his or her testimony, or by evidence pertaining to his or her motives.

I am not intimating that any witness has testified falsely. But it is my duty to instruct you on all the law which may be applicable so that you know that you may disregard any testimony which you feel has been falsely given.

The weight of the evidence is not determined necessarily by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence.

You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a great number of witnesses on the other side.

You are instructed that the testimony of one witness is sufficient to prove any fact, and may justify a verdict in [108] accordance with such testimony. This is so, even if a number of witnesses testify to the contrary, if, in considering all the circumstances of the case, the jury finds that the testimony of one witness is the most accurate and credible.

* * *

[109] When a person comes into the Court and makes a complaint, the burden of proof is on the complaining party, the plaintiff.

In a negligence suit, which is what we have before us today, the plaintiff must prove that the defendant was negligent and that this negligence was the proximate cause of the [110] plaintiff's injuries. The plaintiff must carry this burden of proof by what is

termed a preponderance of the evidence.

Preponderance of the evidence means such evidence, as when weighed against that opposed to it, has the more convincing force. It is a question of quality and not quantity; which is to say, that it is not necessarily determined by the number of witnesses or documents bearing on a certain version of the facts.

To establish by a preponderance of the evidence is to prove that something is more likely so than not so.

In other words, a preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has the more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.

A party has succeeded in carrying the burden of proof by a preponderance of the evidence on an issue of fact if, after consideration of all the evidence in the case, the evidence favoring his side of the issue is more convincing to you and causes you to believe that on that issue the probability of truth favors that party. If, however, you believe that the evidence on an issue is evenly balanced, then your finding on that issue must be against the party upon whom the burden [111] of proof of that issue rested.

In determining whether any question has been proved by a preponderance of the evidence, you should consider all the evidence bearing upon such question, regardless of who produced it. A party is entitled to the same benefit from the evidence that favors him when produced by his adversary as when produced by himself.

I have said to you that it is the plaintiff's burden to prove by a preponderance of the evidence that the defendant was negligent.

Sometimes negligence is defined as a breach of a duty which one party owes to another party, or which is owing by a person to himself or herself.

Negligence is the failure to use that care which a reasonably prudent person would exercise under the circumstances.

Negligence is the failure to exercise ordinary care. It is the doing of some act which a person of reasonable prudence would not do; or the failure to do something which a person of reasonable prudence would do, if he were actuated by those considerations which ordinarily influence everyday conduct. It is the failure to use ordinary care in the management of one's property or one's person.

Negligence is not an absolute term, but a relative one. This means that in deciding whether there was any negligence [112] in this case, the conduct of a person must be considered in the light of all of the surrounding circumstances which have been shown to you by the evidence.

The reason for this rule is that we know that a reasonably prudent person will react differently to different circumstances. These circumstances enter into and are a part of the conduct in question.

An act that is negligent under one set of circumstances might not be so under another.

Therefore, to arrive at a fair standard, the jury should ask what conduct might reasonably have been expected of a person of ordinary prudence under the same circumstances.

Your answer to that questions gives you a criterion by which to determine whether or not the evidence before us proves negligence.

You will note that the standard of care required is that exercised by a person of reasonable and ordinary prudence; rather than that exercised by a person of extreme caution or exceptional skill.

While exceptional skill is to be admired and encouraged, the law does not demand it as a general standard of conduct.

You will further note that in the exercise of ordinary care, the reasonably prudent person will vary his conduct in [113] direct pro-

portion to the danger which he knows, or should know, to be involved in his undertaking.

The amount of the caution required by the law increases with the danger that reasonably should be apprehended.

No inference of negligence, whatever, arises from the mere happening of the accident in this case. You are not to infer from the mere fact that an accident happened, that some party or any party to this accident was negligence. On the contrary, the presumption is that reasonable care was exercised by both parties.

As I have already indicated, you and you alone are to judge whether or not this presumption of any negligence was rebutted or overcome by the plaintiff in proving her case.

If the plaintiff has shown by a preponderance of the evidence that the defendant was negligent, this is not enough.

The plaintiff must also prove by a preponderance of the evidence that the defendants' negligence was the proximate cause of the injuries which she sustained.

When reference is made to the defendant, it is also intended to include defendants, plural.

The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause, the [114] one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or by putting intervening agencies in motion.

The law does not permit you to guess or speculate as to the cause of the accident involved in this case.

If, in your mind, the evidence is equally balanced on the issue of negligence or proximate cause, so that it does not preponderate

in favor of the party making the charge, then he has failed to sustain his burden of proof.

You are instructed that in this case the parties have agreed that on May 30, 1963, at about 1:40 A.M., plaintiff Ruth Terhune was a passenger in a car driven by the defendant Gaddy in a westerly direction on "R" Street, Northwest, at the intersection with 15th Street, in the District of Columbia; at the same time defendant Coviello was operating an automobile north on 15th Street; the two cars collided at the intersection on 15th and "R" Streets, Northwest; the intersection was controlled by traffic lights which, at the time of the accident, were flashing red for traffic on "R" Street and flashing yellow for traffic on 15th Street; it was dark, misty and the pavement was wet.

This evidence is binding upon you and not open to dispute.

[115] You will note that the standard of care required is that exercised by a person of reasonable and ordinary prudence; rather than that exercised by a person of extreme caution or exceptional skill.

While exceptional skill is to be admired, the law does not demand it as a general standard of conduct.

A person has a right to assume that others will perform their duty under the law, and that such others are possessed of the normal faculties of sight, hearing and intelligence, and that these faculties are being used in the exercise of ordinary care; and he has a further right to rely and act on that assumption.

Every person driving on a public highway must exercise ordinary care at all times to avoid colliding with other persons who also are using the highway, and to avoid placing himself or others in danger. And while he may assume that others will exercise due

care and obey the law, he may not, for that reason, fail to exercise ordinary caution.

The traffic regulation requiring a motorist to stop at a stop sign and to yield the right-of-way to any vehicle which is within the intersection or approaching so closely thereto, as to constitute an immediate hazard, imposes upon such motorist a duty to observe moving traffic and to give way to an [116] approaching vehicle which would constitute an immediate hazard; which phrase means a vehicle so close to the intersection that should it continue with undiminished speed and should the unfavored vehicle cross its path, the two would reach the point where their paths would converge at approximately the same time.

You are instructed with respect to the issue to right-of-way or the negligence of a party in failing to yield the right-of-way, that such right-of-way is relative and not absolute; that you must take into consideration not only who had the technical right-of-way but the relative distance of the vehicles from the intersection, their respective speeds, and other prevailing traffic conditions.

You are further instructed that the party having the right-of-way has the right to assume that the other party will comply with the law and yield to him. But the fact that he has the technical right-of-way does not excuse him from exercising ordinary care to avoid injury to others.

The traffic regulations of the District of Columbia, which have been read into evidence, set out the applicable standards of conduct which, of themselves, fix the duty of care required by one in the same situation as the defendants.

[117] You are instructed, therefore, that the violation of any of these regulations, if any, by the defendants, is negligence as a matter of law.

Whether or not this negligence caused the injury, however, is a separate question.

Negligence alone does not equal liability unless this negligence proximately caused the injury. The fact of its existence is of no consequence; stated in another way, if the violation created a hazard which the regulation or regulations were intended to avoid and which does, in fact, bring about the harm to the plaintiff which the regulation or regulations were intended to prevent, the violation is a legal cause of the harm.

You must, therefore, find that the regulation or regulations were violated and that this violation was a proximate cause or one of the proximate causes of the injury to the plaintiff before you can determine liability.

* * *

[119] You are instructed that while there are two defendants in this case, it does not follow that if one is liabile, both are liable. Each is entitled to a fair consideration of his own defense and is not to be prejudiced by the fact, if it should become a fact, that you may find against the other.

The general instructions I gave you govern the case as to each defendant, to the same effect as if he were the only defendant in the action.

* * *

[120] If, in these instructions, any rule, direction, or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you.

For that reason you are not to single out any certain sentence, or any individual point or instruction, and ignore the others. But you are to consider all the instructions as a whole, and to regard each in the light of all the others.

[121] You are not to permit yourselves to be influenced by anything the Court has said or done which you might think suggested to you that she is inclined to favor the claims or positions of either party. I have not intended to express or to intimate any opinion as to what witnesses are worthy of belief or disbelief; what facts are established; which facts have not been established; or what inferences should be drawn from the evidence.

If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to disregard that seeming indication.

* * *

[Filed October 16, 1968]

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given this 16th day of October, 1968 that the defendant Francis G. Coviello, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 13th day of September, 1968 in favor of Ruth Terhune, and that the defendant William Alfred Gaddy, hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 13th day of September, 1968 in favor of Ruth Terhune, and from the Order of this Court entered on the 24th day of September, 1968 denying the defendants', Francis G. Coviello and William Alfred Gaddy, Motion for Judgment Notwithstanding the Verdict, Motion for New Trial,

and Motion for Remittitur.

[Subscription Omitted in Printing]

[Certificate of Service Omitted in Printing]

[Standardized Jury Instruction as noted in Statement of Points]

91 PASSENGER — IMPUTATION OF DRIVER'S NEGLIGENCE

If you find that the driver of the vehicle in which the plaintiff was a passenger negligently and proximately contributed to the causing of this accident, and if you further find that the plaintiff and that driver were joint venturers, as I have defined that term, then the driver's negligence must be imputed to the plaintiff passenger, and said passenger may not recover. On the other hand, if you find that the plaintiff and the driver of the car in which he was riding were not joint venturers, then the plaintiff is not legally responsible for his driver's conduct, and, if he himself is free from contributory negligence, any valid claim for relief which he might have is not barred by the negligence, if any, of his driver.

Burke v. Anacostia & P. Ry., 48 App. D.C. 296
Gasque v. Saidman, 44 A.2d 537 (D.C.App.)
Natl. Trucking Co. v. Driscoll, 64 A.2d 304 (D.C.App.)
Stearns v. Lindow, 63 App. D.C. 134, 70 F.2d 738

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92 PASSENGER'S CONTRIBUTORY NEGLIGENCE

A passenger in an automobile or other motor vehicle may, by his conduct, be contributorily negligent, with the result that any re-

covery by him for injuries or damages sustained in the accident will be barred. However, before the passenger's contributory negligence will have such effect, his negligent conduct must proximately cause or participate in causing either the accident or his injuries.

If you find that the plaintiff: [failed to exercise due care for his own safety and protection] [acquiesced in an unlawful overloading or crowding of the vehicle,] [failed to protest or warn against a negligent or unlawful act on the part of his driver, when he had a reasonable opportunity to do so] [failed to warn his driver of a danger, when such warning, had it been given, would probably have prevented the accident, had an opportunity, after becoming aware of his driver's incapacity or recklessness, to leave the vehicle and failed to do so failed to select a proper and safe position in the vehicle,] [rode willingly with a reckless, inexperienced or intoxicated driver] and that such action, or failure to act, caused or combined to cause either the accident or his own injuries, then your verdict must be for the defendant.

McManus v. Rogers, 173 F. Supp. 118 (D.C.D.C.)
Todd v. Jackson, 109 U.S. App. D.C. 7, 283 F.2d 371
Weber v. Eaton, 82 U.S. App. D.C. 60, 160 F.2d 577

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74 JOINT VENTURE

When two or more persons are engaged in an activity in which they are acting in pursuit of a common purpose, and in which they have a mutual interest and a joint right of control, they are engaged in what is known as a joint venture or enterprise. When a joint venture or enterprise exists, each member is deemed to be acting for all other members, with the result that the negligence of one member of a joint venture or enterprise is imputed to all of the other members.

The jury should note that a joint venture relationship is one which necessarily arises from some agreement between the parties, either expressed or reasonably implied, by virtue of which they undertake to share equally the responsibility for, and the right to, the management of the enterprise. This relationship is not one that can spring up accidentally, nor is it one that can be arbitrarily imposed. It is essential that parties to a joint venture be in pursuit of a common object and acting for a common purpose.

Since whenever a joint venture exists, the negligence of one member of that venture is imputed to all of the others, it follows that your verdict in this case must be alike as to all defendants whom you find to be a member of the joint venture. That is to say, if you find in favor of one, you must find in favor of all of the others; on the other hand, if you find one member of the joint venture to be liable, you must find all other members of the joint venture liable equally and jointly.

ASSUMPTION OF RISK

One who, with full knowledge of the material facts, voluntarily places himself in a situation which he knows or should know involves certain dangers or hazards is deemed by the law to assume the risk that he may be injured by one or more of those dangers or hazards, and he may not recover from another for any injuries or damages which he may sustain by reason of those dangers or hazards.

Before this rule is applied to defeat the plaintiff's claim, however, you must be satisfied by preponderance of the evidence that the danger or hazard which caused the injury to the plaintiff was open and apparent, that he was aware of it, or in the exercise of reasonable care should have been aware of it, and that he voluntarily exposed or subjected himself to whatever hazard or danger might

reasonably have been involved. Moreover, this doctrine of assumption of the risk is not to be applied if you find that the plaintiff had the duty or the legal right to expose himself to any of these hazards.

Dougherty v. Chas. H. Tompkins Co., 99 U.S. App. D.C. 348, 240 F.2d 34.
Weber v. Eaton, 82 U.S. App. D.C. 66, 160 F.2d 577.
Cf. Todd v. Jackson, 109 U.S. App. D.C. 7, 283 F.2d 371.

E30 34-4

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,515

LEONA RUTH TERHUNE
Appellee

v.

FRANCIS G. COVIELLO
and
WILLIAM ALFRED GADDY,
Appellants

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

ISSUE PRESENTED

No evidence was adduced at the trial which would warrant the court below giving jury instructions on:

A. Principal and agent

B. Joint and common venture

C. Imputation of negligence

D. Assumption of risk

E. Contributory negligence

This case has not previously been before the Court.

ARGUMENT

The appendix prepared by appellant is confusing and disorganized. To provide continuity of review and in order to grasp the true spirit of the trial, it is recommended that the record be reviewed in the following sequence:

1. Testimony of plaintiff Leona Ruth Terhune which begins at — Page 30
2. Testimony of witness Alice Terhune which begins at — Page 14
3. Testimony of defendant Gaddy which begins at — Page 20
4. Discussion of jury instructions

   Page 11 line 26 to Page 12 line 15
   Page 26 line 17 to Page 28 line 10
   Page 46 line 10 to Page 52 line 27
   Page 28 line 12 to Page 30 line 23
   Page 52 line 28 to Page 53 line 13
5. Charge of the Court — Page 53

Having reviewed the trial record as set forth above, it is readily apparent that this appeal is frivolous and is an unwarranted usurpation of this Court's time. It should be summarily dismissed without argument. There was no evidence during the trial below which would have justified the Court giving the jury instructions upon which the appeal is based.

The record is devoid of testimony or documentary evidence which would have permitted an instruction to the jury on issues of:

1. Principal and agent
2. Joint venture

3. Passenger imputation of negligence
4. Assumption of risk
5. Contributory negligence

Each instruction requested by appellant sets forth in clear and concise language the essential facts which must be established prior to granting the instruction. A review of the record shows that appellant's theory of the case failed and all of the testimony contravened their trial plan. Attempt as they did, the development of testimony favorable to appellant's defense resulted in a nullity. No case relied upon by appellants in this appeal is applicable and therefore should be rejected.

The testimony is abundantly clear that appellee's status in the automobile was identical to that of the appellant Gaddy. She, like Gaddy, had been asked by another branch of the family to accompany them to Washington (for a purpose of that family only) so that she could help with the driving (App. 15, 19, 31). Appellant received no benefit from this trip, she exercised no control over the journey or its objective (App. 18, 19, 43) and when not driving she was a mere passenger. Appellant had nothing to do with the invitation to Gaddy to drive. In fact, she was directed to let Gaddy do the driving in Washington (App. 16, 34).

Appellant's argument beginning at page 10 of the ~~appendix~~ brief is such a distortion of the testimony and is so imbued with innuendo and inference that this court should ask very candidly "Is this appeal brought in good faith?" Testimony offered by appellants did not contradict that of appellee, and the uncontradicted testimony does not support this appeal. In essence, this appeal is a "grasping at straws" to find some remote and unrelated theory of law which might salvage appellant's case. On major issues of fact the testimony is unrefuted and the charge of the court to the jury adequately

covered all issues developed. In other words, it was a simple uncomplicated case and except for appellant's shotgun request for instructions, there was no conflict on matters material to the real issues.

In view of the foregoing, this appeal should be dismissed and all costs assessed against appellant.

Respectfully submitted,

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